IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-522

THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS, INDIANA,

Petitioner,

vs.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.; DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants; UNITED STATES OF AMERICA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA; THE SCHOOL DISTRICT OF BEECH GROVE, MARION COUNTY, INDIANA; THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body; INDIANA STATE TEACHERS ASSOCIATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 16, 1976.

OPINIONS BELOW.

The majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit and the Memorandum of Decision in Judgment of the United States District Court for the Southern District of Indiana are not yet reported. Copies are set out in the Appendix at A1 and A36, respectively.

JURISDICTION.

The judgment and opinion of the Court of Appeals for the Seventh Circuit were entered on July 16, 1976. No petition for

rehearing was filed. This petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED.

Constitutional provisions and statutes and regulations relevant to the issues in this petition are: United States Constitution Amendment 14, § 1; 42 U. S. C. §§ 1415(7)(b)(i) and 1437f; Indiana Acts 1937, ch. 207 (Housing Authority Act) recodified as IC 1971, 18-7-11; Project Selection Criteria of HUD (24 C. F. R. § 200.700, *et seq.* (1972)); and Low Income Housing Regulation of HUD (24 C. F. R. § 800.101, *et seq.* (1976)), which are set forth in pertinent part in the Appendix.

QUESTIONS PRESENTED.

1. Whether The Housing Authority of the City of Indianapolis, Indiana (HACI) violated the Fourteenth Amendment right of minority students in the Indianapolis Public School System (IPS) to attend a unitary school system by locating public housing units solely within IPS borders, in the absence of findings that HACI had legal authority to locate these units elsewhere or that their location was effected with a racially discriminatory intent, based solely on a finding that their location contributed to the racial disparity between IPS and the surrounding school districts.

2. Whether HACI's failure to locate public housing units outside IPS, if constituting such violation, warrants a District Court order prohibiting their construction anywhere in IPS, even in areas populated by whites, contravening Congressional policy as set out in HUD guidelines, adopted pursuant to the Civil Rights Acts of 1964 and 1968, under which racial concentration is only one of several items to be considered and balanced in determining location.

3. Does IPS have standing to question the location of public housing units by HACI?

STATEMENT OF THE CASE.

The United States commenced this action in 1968 under §§ 407(a) and (b) of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000c-6(a) and (b), against The Board of School Commissioners of the City of Indianapolis, Indiana (IPS), an independent governmental entity, the then only defendant, where the "sole issue" was racial segregation within IPS. By order entered August 18, 1971, the District Court found IPS was ". . . operating a segregated school system wherein segregation was imposed and enforced by operation of law, . . ." (332 F. Supp. 655, at 677, 678). This judgment was affirmed on appeal on February 1, 1973, 474 F. 2d 81, and certiorari was denied June 25, 1973, 413 U. S. 920.

In its August 18, 1971, opinion, the District Court made its own analysis of the effect of the location of public housing projects on the racial composition of the schools in IPS, as follows (332 F. Supp. 655, at 673-674):

> "B. Low-Rent Housing Projects
>
> Low-rent housing projects within the School City have significantly affected the racial composition of the schools. A project typical of this kind is constructed at the periphery of an established Negro residential area and, for that reason among others, attracts a Negro occupancy, which is eventually reflected in the racial composition of the school that serves the area in which the project is situated.
>
> Such an effect is to be seen in several elementary schools, including: School 67, in which Negroes constituted 4% of the student body in 1968-69 and 30.9% in 1970-71, owing to the opening of Eagle Creek Village at Tibbs Avenue and Cossell Road; School 112, in which Negroes constituted 13.7% of the student body in 1968-69 and 42.9% in 1970-71, owing to the opening of Raymond Villa, at Raymond Avenue and Perkins Street; School 71,

in which Negroes constituted 10.8% of the student body in 1965-66 and 92.6% in 1970-71, owing to the opening of Hawthorne Place at 32nd Street and Emerson Avenue; and School 99, in which there were no Negro students in 1968-69 and in which Negroes constituted 33.9% of the student body at the end of the 1970-71 school years, owing to the opening of Beechwood Gardens at 30th Street and Graham Avenue.

Housing projects of the kind just described not only have racial consequences for the schools; each of them tends to represent, as well, a demand for a significant amount of school space. Eagle Creek Village, Raymond Villa, and Beechwood Gardens necessitated additions to Schools 67, 112, and 99, respectively, each of which cost about $1,300,000. Salem Village, at 30th Street and Baltimore Avenue, necessitated the construction of a complete school (School 110), which has served a virtually all-black student body since it was opened in 1966.[81]"

"81. The plaintiff United States of America, which of course sponsors federally supported housing projects, has suggested a finding that the locations of six of the ten projects opened in the School City since 1965 have tended to promote integration in those instances. There is insufficient evidence to support such a finding."

The District Court then postulated seven questions it deemed necessary to remedy this IPS constitutional violation. The seventh question may have involved HACI, as follows (Id. at 679):

"7. Does this Court have the power to override rulings of the said Development Commission or of any other involved agencies with regard to the location of low-rent housing projects, if it finds that the locations of such projects interfere with desegregation, or tend to cause resegregation?"

The District Court ordered IPS to join as third party defendants the "agencies which would appear to have an interest" in this question.

In accordance with this order, on September 29, 1971, IPS filed a cross-claim against HACI and other agencies, asking only for declaratory relief as to the obligation of HACI to give significant weight to the effect of the location of housing projects on the racial composition of the schools in the neighborhood, and its obligation to maintain racially balanced housing projects.

Earlier, on September 7, 1971, the United States moved to have certain school corporations added as additional party defendants, but not HACI. The United States has never, then, or later, filed a complaint or asserted any claim for relief against HACI.

On September 14, 1971, the District Court allowed Donney Brurell Buckley and Alycia Marquese Buckley to intervene as plaintiffs representing a class of school age Negro children and to file a complaint seeking relief against the added defendant school corporations. Jurisdiction was based on 42 U. S. C. § 1983 and 28 U. S. C. § 1343(3). By an amended complaint filed October 21, 1971, appellees Buckley, brought into the action as added defendants, Indiana's Governor, Attorney General, Superintendent of Public Instruction and State Board of Education, and nineteen suburban school corporations, but did not name HACI as an additional defendant, and did not assert any claim against it. The case against these added school corporation defendants, framed by the issues set out in this amended complaint and answer to it, was tried in the District Court in June and July, 1973. On July 20, 1973, the District Court filed its Memorandum of Decision (386 F. Supp. 1191) ordering interim inter-district relief involving the school districts both in Marion and surrounding counties, but not referring to HACI in anyway.

An appeal was taken from this judgment to the Court of Appeals which entered its decision on August 21, 1974 (503 F. 2d 68).

The District Court after remand, on December 13, 1974, made a pre-trial entry setting out the issues to be tried, as follows:

> "2. After discussion, the Court stated that the remaining isues appeared to be, at a minimum, the following: (a) The *effect, if any,* of the passage of the 'Uni-Gov' Act in perpetuating de jure segregation within the boundaries of IPS, and (b) the *effect, if any,* of housing and zoning laws, rules, regulations, and customs in Marion County, Indiana, and its various political subdivisions upon the de jure segregation of IPS." (Emphasis added.)

Since the statement of issues filed by the parties contained no specific charge against HACI, the record is almost devoid of any reference to HACI, and what is there was placed in evidence largely by HACI officials.

This case, on remand, was tried in the District Court in March 1975. The District Court filed its Memorandum of Decision on August 1, 1975. With respect to the housing issue, the District Court held:

> "The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI is located within IPS territory, in some instances just across the street from territory served by one of the added defendant school corporations. Each of such locations was approved—in some instances selected in the first place—by the added defendant Commission. The latter institution has had county-wide zoning jurisdiction at all times during the construction of 10 out of the 11 public housing projects for families, and HACI has at all times had the authority to erect public housing within the City of Indianapolis, and within five miles of the corporate limits of such city. The residents of said public housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory".

With respect to remedy, it also made a series of additional findings reminiscent of its 1971 and 1973 opinions on racial imbalance between IPS and the surrounding school districts and with respect to HACI, held as follows:

> "As previously found, the location by HACI of all of its public housing facilities within IPS territory has had a major influence toward keeping black students confined within IPS, while at the same time keeping the suburban school systems virtually all white. Such conduct should and will be enjoined, so as to prohibit HACI from locating any additional public housing units within the boundaries of IPS. Furthermore, HACI should and will be enjoined from reopening Lockfield Gardens, a public housing project which is now vacant, to tenants other than the elderly."

Simultaneously with the filing of its Memorandum of Decision on August 1, 1975, the District Court entered judgment against HACI and enjoined HACI "from constructing or in any manner acquiring any structure within the area served by IPS for the purpose of offering the same, or parts or portions thereof, for rent as a family type public housing project, and from renovating the presently owned all-black housing project called Lockefield Gardens.

By a 2-1 decision entered July 16, 1976, Circuit Judge Tone dissenting, the Court of Appeals affirmed the District Court's judgments.

The overall factual background consists primarily of matters of Indiana law and undisputed facts and is reasonably clear.

HACI was originally established by the Civil City of Indianapolis pursuant to state statute as a local public housing agency, with area of operation extending five miles beyond the territorial limits of Indianapolis. It was activated in 1949, then deactivated and later reactivated. With respect to project location, however, federal, not state, requirement restricted HACI to the then limits of the City of Indianapolis which were then substantially the same as the boundaries of IPS. Under the United States Housing

Act of 1937, as amended (42 U. S. C. § 1415(7)(b)(1)) and the HUD guidelines, no federal housing project can be federally funded without a cooperation agreement with the local governmental authority, which obligated it to provide the necessary governmental services needed by the low income public housing tenants. HACI had a cooperation agreement with the Civil City of Indianapolis by action of the latter's Common Council but had cooperation agreements with no other governmental body. HACI lacked funds to construct such housing without Federal funding. The Court of Appeals, quoting the District Court, stated (A23):

> ". . . 'The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.' The record supports these findings and clearly shows a 'purposeful, racially discriminatory use of state housing.' *Milliken* v. *Bradley*, 418 U. S. 717, 755 (1974) (Stewart, J., concurring)."

There was no finding by the District Court and no evidence that the refusal to execute cooperation agreements or the location of the housing projects was racially motivated. It ruled out the necessity of such finding in stating the issues (see p. 6, *supra*), and its ultimate finding was stated purely in terms of effect. A fair reading of the Court of Appeals opinion, despite the language set out above, is to the same effect:

> "By locating its projects within IPS and in many cases near all black neighborhoods, the Housing Authority significantly contributed to the disparity in residential and school populations between the inner city and the suburbs. Its acts produced discriminatory effects both within IPS and the suburbs. . . ." (A24.)

Construction of all ten family public housing projects owned by HACI were commenced in the 1960's and were located in census tracts substantially white or mixed in population, only two of which had become substantially black by the 1970 census. They were located in neighborhoods in spite of the

objections of the persons then living in the area. Attempts were made at the time of original occupancy to get a racial balance in these housing projects, and these attempts were successful. Specifically, two family housing projects, Concord and Salem Village, were 30%-40% white; Raymond Villa, 50% white; and Clearstream Gardens, 25% white, at the time of initial occupancy, even though at that time, under HUD guidelines, tenants could not be selected on account of race, and black applications outnumbered white applications for family housing, eight or nine to one. HACI built all of its family housing projects not only in predominantly white neighborhoods but in neighborhoods which were scattered throughout IPS.

Lockefield Gardens was completed in 1936 by the United States Government operating through its Public Housing Administration, and has always been all-black. An extensive remodeling and reconstruction program for Lockefield Gardens was approved in 1973 by HUD which would have reduced the number of housing units from 748 to 325, at a cost of 10.6 million dollars. This program was enjoined by the District Court's judgment.

REASONS FOR GRANTING THE WRIT.

I.

The opinion below squarely conflicts with and disregards *Washington* v. *Davis*, ... U. S. ....., 48 L. Ed. 2d 597 (1976), and other decisions of this Court by predicating a Constitutional violation solely on the racial impact of the acts of HACI officials adopted and taken without a racially discriminatory intent or purpose, rendering inoperative in the IPS area housing policies established by the Congress and implemented by HUD regulations.

As the dissenting opinion below lucidly points out (A33):

> "The District Court, while unconvinced by the reasons given for the selection by the Housing Authority of certain sites near the periphery of the City of Indianapolis, made

> no findings that any of the Housing Authority's decisions were racially motivated. . . ."

The majority opinion's predicate for measuring the Constitutional validity of the location of family public housing units solely within IPS was that their location contributed to racial disparity in school enrollment between IPS and the surrounding school districts, even though the District Court failed to find that HACI had legal authority to locate these units elsewhere or that their location was effected with a racially discriminatory purpose. This "locality" argument is evidenced by the following excerpt from the opinion (A24):

> "By locating its projects within IPS and in many cases near all black neighborhoods, the Housing Authority significantly contributed to the disparity in residential and school populations between the inner city and the suburbs. Its acts produced discriminatory effects both within IPS and the suburbs. The relief ordered by the district court was directed to correcting the effects of those past discriminatory acts. Accordingly, the district court did not abuse its discretion in enjoining the Housing Authority from building additional projects within IPS. That part of the injunction that relates to Lockefield Gardens was also proper since permitting it to be used for family housing, where school children are undoubtedly involved, would only further aggravate the school segregation problem."

Both the District Court and the Court of Appeals have thus proscribed any new public housing units anywhere in any part of any large metropolitan city that is also a part of the city school district, solely because of the possible racial "impact" on population and school children in the entire metropolitan area.

However, this Court has already determined that the predicate for a Constitutional violation is not "racial impact" alone but a racially discriminatory purpose—"a purpose or intent to discriminate." *Swann* v. *Charlotte Macklenburg Bd. of Ed.*,

402 U. S. 1, 32 (1971); *Keyes* v. *School District No. 1*, 413 U. S. 189, 208 (1973); *Milliken, supra*, 418 U. S. 745; *Washington* v. *Davis, supra* (see excerpts quoted in the dissenting opinion below at A27).

This racial impact rule expounded by the Seventh Circuit, based on a "racial balance" test in the entire metropolitan area, would prohibit public housing officials from locating public housing units in any large city of the country where there is a minority racial concentration, even in white neighborhoods, even where public housing units had been located in these neighborhoods in the past and even where the housing authority had no legal authority to locate these units outside of the city.

Equally significant, the decisions of the District Court and the Court of Appeals both disregard the 1972 HUD project selection criteria, 24 CFR § 200.700 et seq. This regulation was adopted pursuant to the authority provided in several housing acts to eliminate discrimination in effecting housing programs and implements Executive Order 11063, 27 F. R. 11527, Title VI of the Civil Rights Act of 1964 (42 U. S. C. 2000d-1), and Title VIII of the Civil Rights Act of 1968 (42 U. S. C. 3608). Under § 200.710 each request for federal funding of a housing project requires the filing of an Evaluation of Request form under which each project request is evaluated by eight separate criteria. Criteria 2 involves minority housing opportunity and permits a "superior" or "adequate" rating in any of the following situations (A62):

> "2. *Minority Housing opportunities*
>
> ☐ Superior ☐ Adequate ☐ Poor *Objectives:*
>
> To provide minority families with opportunities for housing in a wide range of locations.
>
> To open up nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination.
>
> (A) A *superior* rating shall be given if the proposed project will be located:

(1) So that, within the housing market area, it will provide opportunities for minorities for housing outside existing areas of minority concentration and outside areas which are already substantially racially mixed; *or,*

(2) In an area of minority concentration, but the area is part of an official State or local agency development plan, and sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project outside areas of minority concentration.

(B) An *adequate* rating shall be given if the proposed project will be located:

(1) Outside an area of minority concentration, but the area is racially mixed, and the proposed project will not cause a significant increase in the proportion of minority to nonminority residents in the area; *or*

(2) In an area of minority concentration and sufficient comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration; *or,*

(3) In an area of minority concentration, but is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area. (An "overriding need" may not serve as the basis for an "adequate" rating if the only reason the need cannot otherwise feasibly be met is that discrimination on the basis of race, color or national origin renders sites outside areas of minority concentration unavailable); *or,*

(4) In a housing market area with few or no minority group residents.

All "superior" and "adequate" ratings shall be accompanied by documented findings based upon relevant racial, socioeconomic, and other data and information.

(C) A *poor* rating shall be given if the proposed project does not satisfy any of the above conditions, e.g., will cause a significant increase in the proportion of minority residents in an area which is not one of minority concentration, but which is racially mixed."

Both Courts below completely disregard the mandate of Congress expressed in these guidelines and have enjoined public housing by HACI throughout the IPS area of 500,000 population upon a judicially fashioned remedy they feel socially necessary to secure a metropolitan racial population balance in school enrollments, without other constitutional predicate, in violation of the principles set out in *Washington*, *Milliken*, and *Swann*, *supra*. Their position, fairly stated, is that "blacks are confined" to IPS by any housing assistance to blacks in that area since otherwise they might have moved out—though there was no evidence to this effect.

Even more disturbing, the logic which would prevent HACI from adding new or used low-rent housing projects in the IPS area irrespective of the location of the site, would also prevent it from participating in rent subsidies to low-income families anywhere in the IPS area under Section 8 of the Lower-Income Housing Assistance program adopted by Congress in 1974 (42 U. S. C. § 1437f). This is the only expansion housing program now administered by HACI. See, *Hills* v. *Gautreaux*, 47 L. Ed. 2d 792, 807 (U. S. 1976). Under this Congressionally established program, a person entitled to a rent subsidy selects a housing unit "suitable to the [person's] needs and desires in *any area*" where a local housing authority "determines that it is not barred from entering into contracts" on a "finders-keepers" basis. 24 C. F. R. § 882.103 (A83). The lease with the private landlord is supervised by HACI, the subsidy being funded by an annual contributions contract with HUD. *Id.*, at §§ 882.116 and 882.119 (A92 and A94). Participation by HACI, the landlord, and the tenant requires compliance with the Civil Rights Acts and the Executive Order cited above and their implementing regulations. *Id.*, at § 882.111 (A90).

If the Courts below are free to disregard Congressional policy in these areas, what of urban renewal programs, model cities programs, and any other programs of benefit to inner city minorities? What effect will such a precedent have on the sizeable

central area of many metropolitan areas throughout the Nation? The decision below raises important Federal questions in conflict with the principles established by this Court.

II.

The opinion below, by predicating a violation of the Fourteenth Amendment right of minority students in IPS to attend a unitary school system on the inability of HACI to locate outside the boundaries of IPS because the suburban officials had not entered into a cooperation agreement with HACI conflicts with the decision of this Court in *James* v. *Valtierra,* 402 U. S. 137 (1971). In this case, this Court established that the refusal of a civil government under these circumstances was not a Fourteenth Amendment violation with respect to the location of public housing within a jurisdiction. Yet such location of public housing is the essence of the purported Constitutional violation against the rights of minority children here involved.

The decision in the instant case is also contrary to *Mahaley* v. *Cuyahoga Met. Housing Authority* (6th Cir. 1974), 500 F. 2d 1087, 1092) wherein the Court said:

> "The Supreme Court thus construed the plain language of the Act to mean exactly what it says, namely, that it is for the municipalities to decide whether they need low-rent housing and whether they desire to sign cooperation agreements. There is no basis to infer discrimination upon the part of a municipality for doing what it has a lawful right to do under the express provisions of the housing Act."

III.

The approval by the Court of Appeals of the District Court order absolutely prohibiting the construction of public housing units anywhere in IPS, even in areas populated by whites, solely because of the racial disparity in the entire metropolitan area, contravenes other Court of Appeals decisions in the Second,

Third, Fifth and Seventh Circuits contravening Congressional policies set out in HUD guidelines.

This Court of Appeals decision is in conflict with *Jones* v. *Tully* (E. D. N. Y. 1974), 378 F. Supp. 286, *affirmed sub nom. Jones* v. *Meade* (2nd Cir. 1975), 510 F. 2d 961, wherein the Court upheld HUD's approval of the construction of low-rent housing in a predominantly black area in accordance with selection criteria set forth in the then applicable HUD guidelines. In upholding HUD's determination as to site selection, the court carefully reviewed HUD's procedures to determine if they were administered in such a manner as to affirmatively further the policies of the Civil Rights Acts. The court concluded that HUD had supervised the locality's efforts to develop low and moderate income housing and had carefully screened proposed projects in light of the selection criteria under the 1964 Civil Rights Act. The court stated with regard to HUD's procedures (p. 293):

> "If HUD adopts the proper procedures and considers the relevant factors to effectuate the congressional policy, there is no bar to HUD's approval of a housing project in a predominantly black neighborhood as it did in this case. See *Croskey Street Concerned Citizens* v. *Romney*, 335 F. Supp. 1251 (E. D. Pa.) Aff'd, 459 F. 2d 109 (3rd Cir. 1971). Thus low-income housing and racial concentration in a particular site are not mutually exclusive if justified by the relevant housing factors."

In *Shannon* v. *HUD* (3rd Cir. 1970), 436 F. 2d 809, the Court did not prohibit the location of public housing units in areas of minority racial concentrations under all circumstances, but left HUD and the local housing agency the freedom for determining site selection to consider many factors including but not limited to the matter of minority racial concentration. *Shannon* has been commended in 85 Harvard Law Review, 876-8, as follows:

> "Regardless of how effective the maximum use of site selection and tenant selection may be as integrative tools

a rule imposing upon HUD a duty to approve only projects which decrease racial concentration may conflict with other national policies. Although it is certainly national policy to provide integrated housing, it is also national policy to construct enough housing to keep pace with a demonstrated general housing need and with low income and black housing needs in particular. Since local agencies or sponsors initiate urban renewal projects, the constraints of local political review may create conflicts between a policy of building needed housing and a policy of integrating neighborhoods. Political opposition to aggressive site selection and tenant selection might cause local agencies to reduce or eliminate entirely their low income housing effort. Even if current housing efforts are sustained, the tenant and site selection necessary to achieve long range integration would tend to limit the number of units available to low income blacks; thus otherwise qualified black applicants may not be adequately housed.

Recognizing these difficulties, *Shannon's* administrative law theory is preferable to a blanket decree requiring HUD to use its programs to eliminate residential segregation. Complex patterns of urban life are unlikely to yield easily to any rigid judicial rule which isolates one factor; rather, resolution of all the considerations involved will require expert analysis and, in some cases, public participation. The difficulty of implementing such a substantive requirement would undoubtedly necessitate the continuing supervision of the courts which lack both the expertise and the fact-finding capabilities necessary to determine the impact of a low income project upon an urban housing market. Moreover, the *Shannon* court, unlike the court in *Gautreaux*, was not faced with the prospect of remanding to an agency which, by a history of prior discrimination might not be trusted to carry out in good faith a mandate to consider the effects of its programs on racial concentration. *Shannon's* approach thus relieves the courts of the more subtle and complex burdens of urban replanning while nevertheless providing a basis for judicial review which will help to insure the substantive integrity of HUD's decisions."

In *Crow* v. *Brown, et al.* (N. D. Ga. 1971), 332 F. Supp. 382, affirmed (5th Cir. 1972), 457 F. 2d 788, the Court of

Appeals for the Fifth Circuit affirmed the denial of a request to enjoin the Atlanta Housing Authority from future construction of public housing projects inside Atlanta until "a reasonable amount" (332 F. Supp. at 394) is dispersed throughout the white unincorporated areas through its cooperation agreement with Fulton County, because, although 70 percent of the school population of Atlanta was black (457 F. 2d at 789), most of the new units proposed by the Atlanta Housing Authority were to be built in areas both in and out of Atlanta which were predominantly white.

In *Southeast Chicago Commission* v. *HUD* (7th Cir. 1973), 488 F. 2d 1119, the Court refused to set aside a HUD mortgage commitment and approved the location of low-income urban renewal housing units "immediately across the street from an all-black area," a location characterized as "an area of minority concentration," and a few blocks from another federal housing project with a 91 percent black occupancy (p. 1130). The Court relied on the conclusion of the federal housing officials that if the project itself were not integrated "no significant impact upon the stability or racial concentration" of the area would result, and that the project was greatly needed by low-income residents in the area (p. 1129).

IV.

HACI is a party to this lawsuit only because the District Court ordered IPS to join it as a party (332 F. Supp. at 780). Neither the United States, the original Plaintiff, nor the Intervening Plaintiffs have at any time filed any pleading seeking any relief against HACI. IPS by its cross-claim asked only for declaratory relief. The Intervening Plaintiffs are not potential occupants of any proposed family housing or potential displacees as in *Norwalk CORE* v. *Norwalk Development Agency* (2nd Cir. 1968), 395 F. 2d 920, or a beneficiary of federal funds as in *Gautreaux* v. *Chicago Housing Authority*, 265 F. Supp. 582 (N. D. Ill. 1967). Neither IPS nor the Intervening

Plaintiffs may have sufficient interest in the operations of HACI to meet the test articulated in *Baker* v. *Carr* (1962), 369 U. S. 186, 204, as necessary before a court can properly formulate a remedy, as follows:

> "A federal court cannot 'pronounce any statute, either of a State or of the United States, void because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' Liverpool, N. Y. & P.S.S. Co. v. Emigration Comrs. 113 US 33, 39, 28 L ed 899, 901, 5 S Ct. 532. Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law."

To sweep HACI in as part of a school desegregation remedy without a sharpening of the issues, in the absence of findings that the location of family public housing units in IPS either caused a black not to move to the suburbs or caused whites to move to the suburbs, is an example of the wisdom of this quoted language in *Baker* v. *Carr*.

There is no finding that the black population of IPS would have been smaller had no housing projects been built in Indianapolis, and no finding that blacks eligible for public housing and needing the kinds of local services not generally available outside of IPS would have occupied public housing projects outside of IPS. Placement of low-income housing in all-white neighborhoods outside of IPS may not significantly affect the area's racial composition until the low-income housing needs of whites in the vicinity have been met. Tenancy in low-income housing units tends to take on the racial character of the areas in which they are located. See Ledbetter, *Public Housing—A Social Experiment Seeks Acceptance*, 32 Law and Contemporary Problems 490, 503 (1967), which states, "If the units are built in an all-white neighborhood, the project will probably

be all white." Further, even assuming that blacks could have been transplanted to suburban public housing projects, the District Court did not find, and there is no evidence, that the IPS black population is larger because public housing was provided—that there would have been any lesser black population in IPS in the absence of public housing.

Such a "cause and effect" finding is the essence of a finding of a constitutional violation, and is missing here. Specifically, it must be shown that "racially discriminatory acts . . . have been a substantial cause of inter-district segregation." *Milliken, supra,* 418 U. S. at 745. See also *Swann* v. *Charlotte Mecklenburg Bd. of Ed., supra,* 402 U. S. at 16.

CONCLUSION.

WHEREFORE, the Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A.

OPINIONS BELOW.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Nos. 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965, and 75-2007

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, by their parent and next friend RUBY L. BUCKLEY, on behalf of themselves and all Negro school age children residing in the area served by the original defendants herein,
Intervening Plaintiffs-Appellees,

vs.

BOARD OF SCHOOL COMMISSIONERS OF CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP-68-C-225

S. HUGH DILLIN, *Judge.*

Argued December 3, 1975—Decided July 16, 1976

Before FAIRCHILD, *Chief Judge,* SWYGERT and TONE, *Circuit Judges.*

SWYGERT, *Circuit Judge*. This is the third review of successive desegregation orders in a suit brought in 1968 by the United States against the Board of School Commissioners of the City of Indianapolis. The issue before us, as in *Milliken* v. *Bradley*, 418 U. S. 717 (1974), concerns the appropriate exercise of federal equity jurisdiction. The district court found two violations of the Equal Protection Clause upon which it based the interdistrict remedies that are at issue on this appeal. The first was the failure of the state to extend the boundaries of the Indianapolis Public School District (IPS) when the municipal government of Indianapolis and other governmental units in Marion County, Indiana, were replaced by a consolidated county-wide government called Uni-Gov. The second violation was the confinement of all public housing projects (in which 98 percent of the residents are black) to areas within the boundaries of the City of Indianapolis.

On the basis of these violations the district court determined that a limited interdistrict remedy would be appropriate. The court ordered a transfer of black IPS students in grades 1-9 to suburban school districts (except two) within Marion County in such number as to cause the total enrollment of pupils in the suburban schools to be 15 percent black after the transfer. The district court also enjoined the Housing Authority of the City of Indianapolis from constructing any future public housing projects inside the boundaries of IPS and from renovating a housing project known as Lockefield Gardens for other than elderly persons.

On the basis of the entire record and the findings of the district court, we affirm.

I.

The History of the Case

The history of this litigation was described in our most recent opinion, *United States* v. *Board of School Commissioners of*

City of Indianapolis, Indiana, 503 F. 2d 68, 71-75 (7th Cir. 1974), *cert. denied,* 421 U. S. 929; nonetheless, a brief summary is appropriate.

There have been four phases in this suit. In *Indianapolis I* the sole issue was racial segregation within the schools in the Indianapolis Public School District. Judge Dillin, after noting Indiana's official policy of school segregation until 1949, reviewed the conduct of IPS since that year and found the school district guilty of *de jure* segregation. *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 332 F. Supp. 655 (S. D. Ind. 1971).

The court then ordered the United States to add as defendants other school districts in the metropolitan area in order to provide the proper setting for consideration of the appropriateness of a metropolitan remedy. The Government complied with the order. The Buckley plaintiffs, representing a class of black school children, were granted permission to intervene. They joined as defendants several state officials and additional school districts.

On appeal this court affirmed, finding that there was a clear pattern of purposeful discrimination in the gerrymandering of school attendance zones, in the segregation of faculty, in the use of optional attendance zones among the schools, and in school construction and placement—a "[P]attern of decision making which . . . reflected a successful plan for *de jure* segregation." *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 474 F. 2d 81, 84-88 (7th Cir. 1973), *cert. denied,* 413 U. S. 920.

After remand from this court, the district court in *Indianapolis II* took up the problem of fashioning a remedy. One of the issues at trial was the constitutionality of the Uni-Gov Act. The court ordered a remedy without reaching this question. The court found that a meaningful permanent desegregation plan could not be accomplished within the boundaries of IPS, based upon evidence that when the percentage of blacks in a given school

approaches 25 to 30 percent white flight accelerates, resulting in resegregation. *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 368 F. Supp. 1191 (S. D. Ind. 1973). The court further found that the State of Indiana, its officials, and agencies by various acts and omissions promoted segregation and inhibited desegregation within IPS, so that the state which was ultimately charged under the Indiana law with the operation of its public schools had a continuing affirmative duty to desegregate the Indianapolis school system.

The court then ordered a broad interdistrict remedy which encompassed the entire metropolitan area including school districts outside of Marion County. The court held it was the duty of the state, through its General Assembly, to devise its own plan of desegregation, with the understanding that if it failed to do so within a reasonable time the court would have the authority and duty to formulate its own plan. As interim relief, the court ordered IPS to effect pupil reassignment for the 1973-1974 school year sufficient to bring the number of black pupils in each of its elementary schools to approximately 15 percent.

In response to the court's order for the interim relief, IPS submitted a desegregation plan. The court rejected it as inadequate and appointed a two-member commission to develop a plan. This plan was approved by the court and has been implemented. The district court also ordered IPS to transfer to certain defendant school districts a number of black pupils equal to 5 percent of the 1972-1973 enrollment of each transferee school (with certain exceptions). (This portion of the order was stayed incident to subsequent proceedings.) *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 368 F. Supp. 1223 (S. D. Ind. 1973).

In *Indianapolis III* the court issued a supplementary opinion in which Judge Dillin proffered recommendations to the State of Indiana for implementing a desegregation plan. In response, the General Assembly adopted a bill that provides for the adjust-

ment of tuition among the transferor and the transferee districts and for the reimbursement of transportation costs by the state whenever a federal or state court makes certain findings.[1]

On appeal from *Indianapolis II and Indianapolis III* this court, besides affirming the commission's interim IPS plan, affirmed the district court's holding that the State of Indiana, as the ultimate body charged with responsibility of operating its public schools, "[H]as an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries . . . ." *United States* v. *Board of School Commissioners,* 503 F. 2d 68, 80 (7th Cir. 1974), *cert. denied,* 421 U. S. 929. This court, however, in accordance with *Milliken* v. *Bradley,* 418 U. S. 717 (1974), reversed the district court's order pertaining to the interdistrict remedy as to those school districts outside of Uni-Gov (Marion County). That portion of the order pertaining to the interdistrict remedy within Uni-Gov was vacated and remanded for further proceedings. We said:

> The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken.* 503 F.2d at 86.

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1. The Indiana Statute, Acts 1974, P. L. 94, § 1; I. C. 1971, 20-8.1-6.5-1, Burns Ind. Stat. Ann. § 28-5031 (1971), provides in pertinent part:

> This chapter applies solely in a situation where a court of the United States or of the State of Indiana in a suit to which the transferor or transferee corporation or corporations are parties has found the following: (a) a transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders; (b) a unitary school system within the meaning of such Amendment cannot be implemented within the boundaries of the transferor corporation, and (c) the Fourteenth Amendment compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such Amendment.

On remand, in *Indianapolis IV* (unreported opinion), the district court held another evidentiary hearing on Uni-Gov and housing practices within Marion County. In regard to Uni-Gov Judge Dillin found:

> The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons . . . . When the General Assembly [which under state and federal law had a duty to alleviate segregation in IPS] expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation [*sic*] IPS.

Referring to the suburban Marion County units of government, he stated:

> They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has [*sic*] been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court.

With respect to the public housing authorities the district judge said:

> The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI is located within IPS territory, in some instances just across the street from territory served by one of the added defendant school corporations. Each of such

> locations was approved—in some instances selected in the first place—by the added defendant Commission. The latter institution has had county-wide zoning jurisdiction at all times during the construction of 10 out of the 11 public housing projects for families, and HACI has at all times had the authority to erect public housing within the City of Indianapolis, and within five miles of the corporate limits of such city. The residents of said public housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.

Based on these findings and those set forth in his former opinions, Judge Dillin ruled that an interdistrict remedy was necessary to effect desegregation within IPS. He again found that if desegregation were limited to IPS, schools within IPS would become 42 percent black, and that this percentage exceeded the "tipping point" at which resegregation would occur. He commented:

> The Court of Appeals has called the attention of this Court to the rule of law that "white flight" is not an acceptable reason for failing to dismantle a dual school system. 503 F.2d 80, citing *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 491, 92 S.Ct. 2214, 2218, 33 L.Ed.2d 75 (1970). However, it does not follow that this Court must ignore the probability of white flight in attempting to formulate guidelines for IPS to follow in accomplishing the final desegregation of its schools. In other words, as this Court sees it, white flight may not be used as an excuse for inaction; it may, however, supply the reason for a particular kind of action.

Judge Dillin therefore ordered the transfer of 6,533 students from IPS to other school districts in Marion County. An additional 3,000 students were to be transferred in the second year of the plan, raising the proportion of black students in the

suburban schools to 15 percent.[2] No transfers were ordered to Washington and Pike Townships, which already had black populations of 12 and 4 percent. The district court also enjoined the Housing Authority from building any more family housing projects in IPS territory and from renovating an all black project called Lockefield Gardens. Finally, the Buckleys were awarded attorneys' fees under 20 U. S. C. § 1617.

All the defendants have appealed. The defendants other than the Housing Authority challenge the interdistrict transfers ordered by the district court. The Housing Authority challenges the injunction against it. On the other side, the Buckleys, together with an *amicus curiae*, the Coalition for Integrated Education, argue for affirmance of the district court order. The United States argues that the finding of interdistrict violations should be sustained but seeks modification of the portion of the order calling for mandatory interdistrict transfers of students. It argues for affirmance of the injunction against the Housing Authority.

II

Facts Pertinent to This Appeal

A. Residential and School Demography of Marion County

In 1969 when Uni-Gov was created, 95 percent of the blacks in Marion County lived in Indianapolis. Only about 50 percent of the whites in the county lived in the city. The black population continues to grow within the core city as reflected by the ratios in the schools. The percentage of black students in IPS increased from 36 percent in 1968 to 42 percent in 1975. The 1974-1975 black/white ratio in IPS was 57.22 percent white and 42.16 percent black. On the other hand, the overall ratio in Marion County was 74.87 percent white and 24.40 percent

2. IPS will be obligated to pay the suburban school districts the cost of educating the transferred pupils. See *supra*, n. 1.

black.[3] For the years 1974-1975 the racial composition of the suburban school districts within Marion County was as follows:

Township	Percentage of White	Percentage of Black
Decatur	99.83	.9
Franklin	99.35	.54
Lawrence	95.50	2.9
Perry	98.64	.23
Warren	98.61	.73
Wayne	97.87	1.19
Beech Grove	99.64	.04
Speedway	99.10	.72

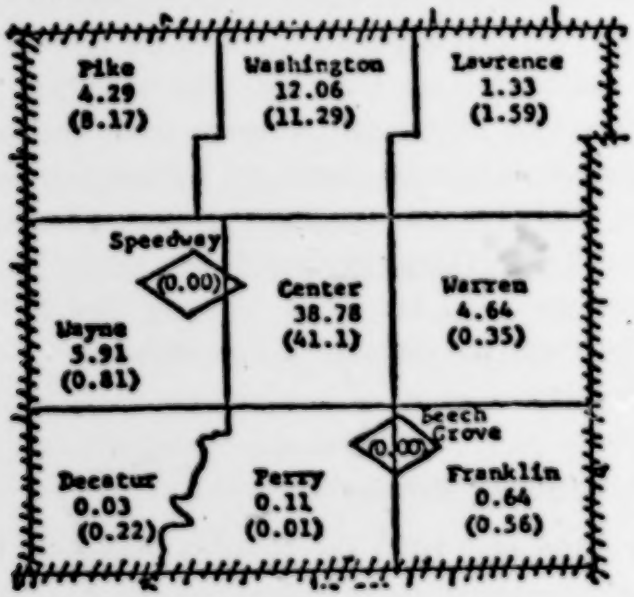
B. Uni-Gov

Until 1969 the boundaries of IPS corresponded roughly to the boundaries of the City of Indianapolis, and the other Marion

3. The black population in Marion County is reflected by the following map.

1973

Percentage of Black Residents in Marion County
(Percentage of Black Students in Marion County Schools)



County school districts were truly suburban. In 1969, however, the so-called Uni-Gov Act, which is officially titled the "First Class Consolidated Cities and Counties Act," Acts 1969, ch. 173, § 101; I. C. 1971, 18-4-1-1 *et seq.*, Burns Ind. Stat. Ann. §§ 48-9101 *et seq.* (1971), transformed Marion County into a consolidated metropolitan government. School districts were specifically excluded from Uni-Gov.

Uni-Gov is governed by a mayor and council. Its purpose was to efficiently reorganize civil government within Marion County. Previously, there had been a splintering of governmental responsibility into loosely controlled agencies with overlapping jurisdictions. Uni-Gov has succeeded to most of the functions of county government and of numerous special service districts. It has also succeeded to the functions of the City of Indianapolis and provides municipal services such as police and fire protection within the approximate area of the old city. The Act contains provisions for expanding the areas in which Uni-Gov delivers these municipal services. See, *e.g.*, I. C. 1971, 18-4-12-36 (fire district); I. C. 1971, 18-4-12-8 (police district).

Uni-Gov has not, however, replaced all existing governmental units in Marion County. For example, the airport authority, the county courts, the building authority, and the hospital corporation were excluded from Uni-Gov. The so-called "excluded cites" of Speedway, Perry, and Lawrence retain their own local governments which provide municipal services in those areas. Nonetheless, Uni-Gov has significant powers even in the excluded cities. It is in charge of air pollution regulation, building code enforcement, and municipal planning and thoroughfare control. Moreover, the citizens of the excluded cities vote in Uni-Gov elections.

C. History of Public Housing

Between 1966 and 1970 the Housing Authority built and opened for occupancy ten housing projects for low-income

families. These and Lockefield Gardens, which was built during the depression, are the only public housing projects for family occupancy in Marion County, although other forms of subsidized housing are available. All ten projects were built within the boundaries of IPS. These projects opened with 50 to 75 percent black occupancies and are now 98 percent black.

The Housing Authority was authorized under state law to construct projects within Indianapolis and within five miles of the city's boundaries. Federal funding could be obtained only if the Housing Authority entered into a cooperation agreement with the municipality or other civil governmental entity having jurisdiction over the territory in which it desired to build. The City of Indianapolis entered into a cooperation agreement with the Housing Authority, but no other governmental entity in Marion County did so, even though the Housing Authority approached the county commissioners about an agreement.

Since 1969, when Uni-Gov became effective, the Housing Authority has apparently had the authority to construct projects outside the old city limits, except in the Towns of Speedway, Lawrence, and Beech Grove, without the need for cooperation agreements. No housing projects have been commenced within or outside IPS since that time nor are any planned. The record does not show why. There are presently pending applications for approximately 3,000 families.

The Housing Authority argued that suitable sites did not exist outside the City of Indianapolis because services such as public transportation would have been unavailable. There was evidence, however, that these services could have been arranged. The evidence showed that public transportation routes could have been extended to areas of demonstrated need, that food stamp distribution offices could have been established at the projects, that sewage services could have been obtained by contract with the city, and that police and fire protection could have been obtained from the city.

Six of the housing projects are on the IPS boundary lines or within a few blocks thereof. For example, Clearstream Gardens was located on the IPS side of a street which divided IPS and Warren Metropolitan School District. A witness for the Housing Authority under questioning by the district court, was unable to state why, "from the standpoint of these criteria you mentioned," there was "any difference at all between the location on the east side or the west side of Emerson Avenue." The other projects and their locations are set forth below.[4] These projects contain between 900 and 1,000 family units and house a substantial number of black school children.

D. History of School District Boundaries

Until 1969, under a variety of laws which are discussed below, the IPS boundaries were largely coterminous with the city boundaries. Under a 1931 act, the boundaries of IPS were made coterminous with those of the city. Acts 1931, ch. 94, §1; I. C. 1971, 20-3-11-1, Burns Ind. Stat. Ann. § 28-2601 (1971).[5] Until 1959, boundaries of school districts and municipalities were also coterminous elsewhere in Indiana, with some

4. Rowney Terrace is ten blocks north of Clearstream Gardens on the same boundary line between IPS and Warren Metropolitan School District (MSD).

Raymond Villa is approximately four blocks north of the boundary line between IPS and Beech Grove.

Laurelwood is in a narrow peninsula of IPS that is surrounded on three sides by Perry MSD.

Concord Village is approximately one-half mile from the Speedway boundary.

Eagle Creek is on the boundary line between IPS and Wayne MSD.

5. Acts 1963, ch. 310, § 4; I. C. 1971, 20-3-11-33, Burns Ind. Stat. Ann. § 28-2633 (1971), provides that the 1931 act remains in effect except to the extent that its various provisions are inconsistent with the 1959 act discussed in the text. The provision of the 1931 act making IPS boundaries coterminous with those of Indianapolis is inconsistent with the 1959 act and consequently was not reenacted by the 1963 act. The 1963 act did not purport to affect the provisions of the 1961 act discussed in the text.

exceptions, and the IPS boundaries merely reflected the generally prevailing condition.

In 1959 the Indiana School Reorganization Act, Acts 1959, ch. 202, § 1; I. C. 1971, 20-4-1-1 *et seq.*, Burns Ind. Stat. Ann. § 28-3501, n (1971), created a complex scheme for consolidating school districts. Consolidations under the Act reduced the number of school districts outside Marion County from 990 to 305. Some 70 percent of reorganized districts were not coterminous with other units of civil government. In some cases consolidated school districts crossed county lines.

Marion County, however, was an exception. School districts there were not consolidated. The Marion County Reorganization Committee, appointed pursuant to the Act, initially recommended that all school systems in the county be merged into one, but the unanimous opposition of the suburban school districts defeated the merger proposal. There is no evidence that this opposition was racially motivated.[6] The Committee's ill-fated consolidation proposal was intended to "develop equal educational opportunities for all children in Marion County," and to "eliminate the confusion of school transfers and dislocations involved in annexation proceedings."

The most substantial reasons against consolidation noted in the Committee's report were that a consolidated school district would be large, with consequent loss in citizen participation and interest in school affairs, and that merger would result in increased school taxes in IPS and two of the suburban districts. The Committee explained that the consolidation plan "had no widespread support—only organized opposition," and that it did not wish to "force a plan (however sound in its conception) upon an unwilling or reluctant public." So, although it believed the arguments in favor of its plan far outweighed the opposition

6. The district judge's comment is pertinent. "In fact, the evidence shows that, with a few exceptions, none of the added defendants have had the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none, . . . " *United States* v. *Board of School Commissioners*, 368 F. Supp. at 1203.

arguments, the Committee, as the district court found, "[R]eversed itself and proposed a plan which, with minor exceptions . . . froze all existing school corporations in Marion County according to their then existing 1961 boundaries." *United States* v. *Board of School Commissioners,* 368 F. Supp. 1191, 1203 (S. D. Ind. 1973). The Committee thereby abandoned both its merger plan and a less radical plan which would have restructured school boundaries on what the Committee regarded as a more rational basis than existing boundaries. Accordingly, the plan adopted in 1962, after approval by the state, did not significantly change boundaries in Marion County, but left those boundaries coterminous with those of civil governmental bodies.

As a result of the 1959 Reorganization Act, school boundaries in most of the state were frozen and thereafter unaffected by municipal annexations. In 1961, however, special legislation was enacted to give the schools within Marion County the flexibility lost by the 1959 Reorganization Act. Acts 1961, ch. 186, § 1; I. C. 1971, 20-3-14-1 *et seq.*, Burns Ind. Stat. Ann. § 28-3610 (1971). Under the 1961 act extension of the boundaries of a civil city automatically extended the corresponding school district boundaries unless the school city and the losing school corporation mutually agreed that the school city territory would not expand with the civil city. The school district whose territory was to be taken could also oppose the civil annexation in a remonstrance suit. The annexation powers of the city, however, proved to be illusory, for they were effectively frustrated by remonstrance litigation.[7]

Another means of annexation under the 1961 act was by mutual agreement between school corporations. IPS (and other school districts with boundaries corresponding with those of a civil city) also had a unilateral power of annexation subject to the right of the school district whose territory was to be taken

7. This frustration of the city's annexation efforts was one of the reasons for Uni-Gov given by Mayor Lugar in his testimony before the district court.

to oppose by remonstrance. No significant action was taken by IPS under this provision.

In summary, until 1969, the combined action of the State of Indiana and its political subdivisions had the effect of leaving the boundaries of the City of Indianapolis and IPS substantially the same despite statewide school district consolidations made under the 1959 act. True, IPS could expand independently of the city, but the city's annexation prima facie carried IPS with it. Although it turned out that no annexations occurred, the policy of the state, as expressed in the 1961 legislation, was that IPS would expand along with the city.

In 1969, after this action was filed, two other acts were adopted. One act, Acts 1969, ch. 52, § 3; I. C. 1971, 20-3-14-9, Burns Ind. Stat. Ann. § 28-3618 (1971), adopted sixteen days before Uni-Gov was enacted, amended the 1961 act by abolishing the power of IPS to follow municipal annexations. Another act, Acts 1969, ch. 239, § 407; I. C. 1971, 18-5-10-25, Burns Ind. Stat. Ann. § 48-722 (1971), limited the remonstrances against municipal annexations to a few, simple, fairly objective grounds.

III.

The overall issue in this appeal is whether the limited interdistrict remedy ordered by the district court is supported by the record and is in accord with the legal principles enunciated in *Milliken* v. *Bradley*, 418 U. S. 717 (1974). Subsumed in the issue are two questions: (1) whether the establishment of Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov, and (2) whether the district court correctly enjoined the Housing Authority of the City of Indianapolis from locating any additional publicly funded housing projects within the boundaries of IPS and from renovating any existing facility for other than the elderly.[8]

8. The school district defendants argue that our mandate limited inquiry on remand to Uni-Gov itself. It is true that our remand

(Continued on next page)

In our opinion, *Milliken's* essential holding is contained in the following language written by Mr. Chief Justice Burger:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann,* 402 U. S., at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. *Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.* Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by

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(Continued from preceding page)

"[F]or further proceedings consistent with" *Milliken* v. *Bradley* was qualified by the specific direction to "[De]termine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken.*" *United States* v. *Board of School Commissioners,* 503 F. 2d 68, 86 (7th Cir. 1974), *cert. denied,* 421 U. S. 929. This direction, however, was itself qualified by a footnote quoting from passages in the opinion of the Court in *Milliken* and in Mr. Justice Stewart's concurring opinion. Both passages mention the drawing of school district lines on the basis of race as a possible ground for interdistrict relief; the former also includes as a possible ground discriminatory acts of other school districts; and the latter mentions "[P]urposeful, racially discriminatory use of state housing or zoning laws" by state officials. *Id.* at n. 23. We interpret the mandate as sufficiently broad to permit consideration of official conduct which arguably bears a historical relationship to the failure to expand the IPS boundaries to match those of Uni-Gov, which includes the failure to change IPS boundaries during the 1959-1962 Indiana school reorganization program and the failure to locate any public housing outside the IPS boundaries. On the intervening plaintiffs' theory of the case, which the district court adopted, this course of conduct was a part of a pattern, of which Uni-Gov was also a part.

> the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy. (emphasis added.) *Milliken* v. *Bradley*, 418 U. S. 717, 744-45.

That holding was further explicated in *Hills* v. *Gautreaux*, 44 U. S. L. W. 4480, 4484 (U. S. April 20, 1976), where Mr. Justice Stewart wrote:

> The Court's holding that there [*Milliken* v. *Bradley*] had to be an interdistrict violation or effect before a federal court could order the crossing of district boundary lines reflected the substantive impact of a consolidation remedy on separate and independent school districts. The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.

In *Milliken* the majority opinion also noted that, "[I]n its present posture the case does not present any question concerning possible state housing violations." *Milliken* v. *Bradley, supra* at 728, n. 7. Mr. Justice Stewart, in his concurring opinion, explicitly explained the relevance of housing discrimination as it relates to an interdistrict remedy in school desegregation cases. Mr. Justice Stewart wrote:

> Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, . . . by transfer of school units between districts, . . . or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate. *Id.* at 755.

With these holdings in mind we turn to the issue of Uni-Gov as it relates to an interdistrict violation.

Although Uni-Gov was a neutral piece of legislation on its face with its main purpose to efficiently restructure civil govern-

ment within Marion County, it cannot be analyzed in isolation if its impact on school district boundaries is to be clearly perceived. Rather it must be considered in conjunction with the two other acts adopted in 1969. (See *supra* pp. 12-13.)

For some time Mayor Lugar had expressed his desire to embark on a more aggressive annexation program in order to bring a greater part of the urbanized area under the city's control. The concept of Uni-Gov was promoted as a more viable alternative to lengthy annexation litigation.[9] The suburban school corporations and their legislative representatives were obviously aware that if Uni-Gov did not pass and the civil city was forced to embark on a more aggressive annexation program as a last resort to reorganizing governmental services, IPS boundaries would automatically extend with the civil city boundaries under the 1961 Annexation Act.[10] In order to avoid this undesired result Chapter 52, 1969 Acts was enacted sixteen days before Uni-Gov was adopted. This Act repealed the provision in the 1961 Act which provided for automatic extension of school city boundaries with the extension of civil city boundaries. Chapter 239, 1969 Acts was also adopted, limiting remonstrances against municipal annexations to a few, simple, fairly objective grounds.

It must be kept in mind that at this time both the General Assembly and the suburban school districts knew that this action was pending in district court. These "fail safe" measures indicated a legislative intent (reflecting local sentiments) that by one means or another the boundaries of IPS would not expand with those of the civil city. We say this because a court is entitled to draw reasonable and logical inferences from

9. Prior city administrations had not strongly pursued civil annexations and those that had been adopted were being effectively thwarted by remonstrances in the courts.

10. Under the 1961 Annexation Act the only way to avoid automatic extension of the school city boundaries, other than by remonstrance, was by mutual agreement between the acquiring and losing school corporations that the school city boundaries would not extend with the civil city boundaries.

probable consequences of changes in the law and the evident purpose of such changes.

Because, in 1969, 95 percent of the blacks in Marion County lived in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were "[A] substantial cause of inter-district segregation." *Milliken* v. *Bradley*, 418 U. S. 717, 745 (1974), and "[C]ontributed to the separation of the races by . . . redrawing school district lines. . . ." *Id.* at 755 (Stewart, J., concurring).

The General Assembly, under both federal law as expressed in *Brown* v. *Board of Education*, 349 U. S. 294 (1955), and in *Green* v. *County School Board*, 391 U. S. 430 (1968), and Indiana law as expressed in Acts 1949, ch. 186, §§ 1-6, 8, as repealed by Acts 1973, P. L. 218, § 1; I. C. 1971, 20-8.1-2-1 —20-8.1-2-7, Burns Ind. Stat. Ann. § 28-5304 (1971), had an obligation to alleviate the segregated condition in IPS. The record fails to show any compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation. The desirability for a unitary civil government should not have precluded the General Assembly from considering the needs of the school system in its decision to enact Uni-Gov. As we noted earlier, the most substantial reasons advanced against the consolidation of the schools in Marion County when it was under consideration in 1959 were that a consolidated school district would be large, with consequent loss of citizen participation, and that it would increase taxes. These considerations, although apparently not racially motivated, cannot justify legislation that has an obvious racial segregative impact. Administrative convenience cannot be a justification for violating the Equal Protection Clause. The district court correctly observed, "When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with [*sic*] IPS."

In summary, we are convinced that the essential findings for an interdistrict remedy found lacking in *Milliken* are supplied by the record in the instant case. In *Milliken* the Supreme Court noted that the Detroit school boundaries were coterminous with the civil city boundaries and "[W]ere established over a century ago by neutral legislation . . . ." *Milliken* v. *Bradley*, 418 U. S. 717, 748 (1974). The Court also observed the district court did not find that the segregative acts within Detroit effected segregation within the other districts. *Id.* at 721. Furthermore, the suburban school districts had not participated in the proceedings, *id.* at 722, and finally, there had been no evidence of any racially discriminatory acts of the state which had been substantial causes of interdistrict segregation, *id.* at 745. The remedy chosen by the district court required a consolidation of fifty-four districts "into a vast new super school district," *id.* at 743.

Indianapolis presents an entirely different situation. The Indianapolis Legislature [*sic*] acted directly in passing Uni-Gov, thereby creating the existing situation which confines black students within IPS. Moreover, the suburban governmental units made it politically expedient that Uni-Gov not include the schools.

In this case we are dealing with a situation in which but for certain events chargeable to the state, Marion County would be either a consolidated school district under the 1959 School Reorganization Act or IPS would have been expanded with the civil city of Indianapolis under Uni-Gov. In this context there is nothing talismanic about the word "district", for school district lines are not sacrosanct. *Milliken, supra* at 744. The following hypotheticals are helpful in analyzing the problem.

> (a) City A has one school district, coterminous with City A. The Government brings a suit, alleging *de jure* segregation in the city schools, particularly in the northeast portion of the city. The defendant school board agrees that the northeast portion of the city must be desegregated, but argues that a district wide remedy is unnecessary,

that is, that only the schools in the northeastern portion of City A need be affected. On these facts, *Keyes* v. *School District No. 1*, 413 U. S. 189, 208 (1973), would control.

(b) City B has one school district that is coterminous with city boundaries. Perhaps fearing an impending desegregation suit, City B decides to contract its school district boundaries so that the school district encompasses the bulk of the central city while the outlying areas of the city organize their own school districts. On these facts, no federal court in a desegregation suit would hesitate in ordering the crossing of district lines to effect a remedy.

(c) City C decides to expand its boundaries and annexes the suburbs surrounding it into a unitary civil government. However, it retains its school district boundaries, previously coterminous with its former city boundaries. In every other respect it provides full city services in and exercises full city authority over the newly acquired territory. These facts are analogous to those of the case at bar. In the event of a meritorious desegregation suit in hypothetical City C, a district court could properly order an interdistrict remedy under *Milliken*.

There is no dispute that a school district may not contract its territory in order to avoid desegregation. *Cf. Wright* v. *Council of City of Emporia*, 407 U. S. 451 (1972). Conversely, a city should not be permitted to extend its boundaries in order to avoid desegregation.

Evans v. *Buchanan*, 393 F. Supp. 428 (D. Del. 1975), *aff'd*, ... U. S. ....., 44 U. S. L. W. 3299 (1975), is a case which is factually analogous to the instant case in many respects and in accord with *Milliken*. In *Evans* the district court had to consider the segregative effects of the Education Advancement Act of 1968, a Delaware school reorganization statute, which explicitly excluded the Wilmington district from a general reorganization of Delaware school districts. Although the district court concluded that the provisions excluding the Wilmington district from school reorganization were not purposefully, racially discriminatory, this did not end its inquiry.

The court noted, "Statutes that do not explicitly deal with race but have a pronounced racial effect, . . . can also establish suspect racial classifications." *Evans* v. *Buchanan, supra* at 441. It further stated that "[W]here a statute, either explicitly or effectively, makes the goals of a racial minority more difficult to achieve than other related governmental interests, the statute embodies a suspect racial classification and requires a particularly strong justification." *Id.* The court therefore held that the Education Advancement Act, although racially neutral on its face, "[H]ad a significant racial impact on the policies of the State Board of Education, . . ." *id.* at 442-443, and thereby constituted a suspect classification. In effect, the statute prevented a predominantly black school district from being reorganized with a predominantly white suburban school district while other districts in the state were able to consolidate. The court finally concluded that "Neither . . . interest in preserving a historic school district boundary, nor the interest in maintaining districts with enrollments below 12,000 . . .," *id.* at 445, was a compelling state interest and did not justify the exclusion of Wilmington in the Education Advancement Act. On this basis the district court ordered an interdistrict remedy. The Supreme Court summarily affirmed.

In light of the above we find that the limited interdistrict remedy ordered by the district court was proper.

IV.

We now turn to the housing issue. As we stated above 95 percent of the black residents of Marion County live in the inner city. Surrounding the inner city are suburbs populated largely by white residents. This phenomenon may have many causes, but we think the district judge was correct in finding as the primary reason discrimination in the availability of housing opportunities for blacks in the suburbs. We are in agreement with Judge Dillin's statement:

> Although it is undoubtedly true that many factors enter into demographic patterns, there can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the urban centers in the north, including Indianapolis, has been racial discrimination in housing which has prevented them from living any place else. *United States* v. *Board of School Commissioners*, 68 F. Supp. 1191, 1204 (S. D. Ind. 1973).

Although the Housing Authority had jurisdiction outside the IPS boundaries, it did not locate any of the public housing projects in that territory. Instead, all ten of the public housing projects whose occupancy is 98 percent black were located within IPS. It is obvious that there is a close relationship between the racial balance in housing and the racial balance in schools. As Judge Dillin found in his 1971 opinion, "Low-rent housing projects within the School City have significantly affected the racial composition of the schools." *United States* v. *Board of School Commissioners*, 332 F. Supp. 655, 673 (S. D. Ind. 1971). He reaffirmed this in his most recent decision, "The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory." The record supports these findings and clearly shows a 'purposeful, racially discriminatory use of state housing." *Milliken* v. *Bradley*, 418 U. S. 717, 755 (1974) (Stewart, J., concurring). The Government's statement in its brief supports this view:

> Given that a disproportionate number of blacks are both in low income categories and were already concentrated in IPS and considering the predominantly black composition of the pool of applicants for the H.A.C.I. low-income housing projects, it is a reasonable inference that this action would and did have a further impact upon the racial compositions of schools and school districts in Marion County.

The Housing Authority contends the district court had no authority to enjoin it from building additional public housing

within IPS and from renovating Lockefield Gardens for other than the elderly because the court could not lawfully find a constitutional violation by HACI in confining its housing projects to IPS territory. The evidence presented above, however, is to the contrary.

By locating its projects within IPS and in many cases near all black neighborhoods, the Housing Authority significantly contributed to the disparity in residential and school populations between the inner city and the suburbs. Its acts produced discriminatory effects both within IPS and the suburbs. The relief ordered by the district court was directed to correcting the effects of those past discriminatory acts. Accordingly, the district court did not abuse its discretion in enjoining the Housing Authority from building additional projects within IPS. That part of the injunction that relates to Lockefield Gardens was also proper since permitting it to be used for family housing, where school children are undoubtedly involved, would only further aggravate the school segregation problem.

V.

The Government contends that the mandatory transfer of students between IPS and the suburban schools ordered by the district court is improper. After conceding the import of *Milliken,* the propriety of interdistrict relief, and noting the specific finding of facts found by the district court to have substantially caused segregation in the other districts, the Government concludes the district court's order was an abuse of discretion. We are confused by the Government's reasoning. We fail to see how the district court abused its discretion when it was clearly acting within the guidelines of *Milliken.* It was not an abuse of discretion merely because the Government would have preferred another remedy.

Furthermore, the Government's arguments are inconsistent. On the one hand, it demands that segregation be eliminated

root and branch from within IPS; on the other, it condemns the only relief which can make its demand a reality. We are surprised the Government seriously offers voluntary transfer as an alternative to mandatory transfer as a means to effectuate its goal of complete desegregation. History has taught us that "freedom of choice" plans produce negligible results. *Green* v. *County School Board*, 391 U. S. 430 (1967).

Even if we were to agree with the Government that voluntary transfers are desirable, Indiana law provides no secure mechanism for achieving this result. The Government suggests that voluntary transfers can be made in accordance with Acts 1973, P. L. § 1; I. C. 1971, 20-8.1-6-1, Burns Ind. Stat. Ann. § 28-5001 (1971), which permits transfers under certain conditions.[11] We do not agree, however, that this law is sufficient to provide for the kind of transfers the district court ordered. The language in the statute is permissive and vague (a transfer *may* be granted if the school corporation feels a child may be better accommodated in another school) and does not contemplate transfers for desegregation purposes. We could hardly believe we were carrying out our duty to dismantle segregation root and branch if we were to choose this law to accomplish our goal.

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11. The statute provides:

> Transfer—General order. — The governing body of any school corporation may grant an order of transfer upon proper application by the parent of any child who resides in that corporation if it feels the child may be better accommodated in the public schools of another school corporation of this state or of an adjoining state. In determining whether a child can be better accommodated, such matters as the proximity of the schools to the residence of the child desiring the transfer, the kind and character of the roads, the means of transportation, and the crowded conditions of the school shall all be pertinent. If there is no high school in the school corporation in which a child resides, the governing body shall grant an order of transfer. When a transfer is granted under this section, transfer tuition shall be paid as provided in this chapter.

The limited interdistrict remedy ordered by the district court is supported by the record and in accord [*sic*] the legal principles enunciated in *Milliken.*

In affirming the district court's order, we suggest that the court monitor the transferance of black pupils from IPS to the other school districts periodically, perhaps on a yearly basis, in order that modifications, if necessary, may be made. This is in the hope that segregation and discrimination will be completely eradicated within IPS in furtherance of the goal of equal opportunity proclaimed two hundred years ago in the Declaration of Independence.[12]

AFFIRMED.

Tone, *Circuit Judge,* dissenting.* There are only two possible interdistrict constitutional violations, in view of our decision on the second appeal, *United States* v. *Board of School Commissioners,* 503 F. 2d 68 (7th Cir. 1974), *cert. denied,* 421 U. S. 929 (1975), as the majority recognizes. These two possibilities are Uni-Gov and the Housing Authority's location of public housing, as to both of which the District Court heard evidence and made findings on remand.

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12. Supplementing Judge Tone's footnotes to his dissent, the author of this opinion acknowledges extensive borrowing from Judge Tone's original draft of an opinion, particularly with respect to the factual background of this case. That use made my task easier, and I am indeed grateful.

* The writing of the court's opinion was initially assigned to me, my tentative vote at conference having been to affirm. After I had devoted much time toward the preparation of an opinion, I came to the view reflected in this dissent. The writing of the court's opinion was therefore reassigned to Judge Swygert, who was already burdened with his share of the work of the Seventh Circuit but nevertheless had to find time for this case. While the results of my work on the record, which I made available to him, were I hope of some use in connection with the writing of his opinion, he got a very late start because of the circumstances just described. I recite this intramural history to record the reason for the unusual delay between oral argument and decision and the fact that Judge Swygert is not responsible for that delay.

Whether these state actions violated the Equal Protection Clause depends upon the existence of a racially discriminatory purpose. Disproportionate effect on minorities without discriminatory purpose is not enough. If this was not clear after *James* v. *Valtierra*, 402 U. S. 137 (1971), *Jefferson* v. *Hackney*, 406 U. S. 535, 548-549 (1972), and *Keyes* v. *School District No. 1*, 413 U. S. 189, 208 (1973), it was made so by *Washington* v. *Davis*, 44 U. S. L. W. 4789 (U. S., June 7, 1976). The Court squarely held in the latter case that equal protection is denied only when the state acts with a racially discriminatory purpose:

> "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. [Original emphasis.]
>
> * * * * *
>
> "The school desegregation cases have . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause.
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> * * * * *
>
> ". . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." 44 U.S.L.W. at 4792, 4793.

The record before us does not contain findings or evidence that the state acted with a racially discriminatory purpose in connection with Uni-Gov or public housing siting.[1] An essential element of an equal protection violation is therefore missing.

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1. The criterion of racially discriminatory purpose is, of course, often not easy to apply. Even if, in any given case, a body such as a legislature or school board can be said to have a collective intent (see R. Dickerson, *The Interpretation and Application of Statutes* 67, *et seq.* (1975)), that intent is often difficult to ascertain. See Justice

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One other governing principle should be noted at the outset. *Milliken* v. *Bradley*, 418 U. S. 717 (1974), in language we are not free to ignore, focused on the constitutional right to be vindicated. Amplifying the statement quoted by the majority that "the scope of the remedy is determined by the nature and extent of the constitutional violation," *id.* at 744, the Supreme Court said two pages later:

> "Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system. . . .
>
> "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit District to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so. The view of the dissenters, that the existence of a dual system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils, cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either

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Powell's concurrence in *Keyes*, 413 U. S. at 217, 233-234. For this reason Justice Stevens, concurring in *Washington* v. *Davis*, observed that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume," and based his concurring vote, in a manner reminiscent of Justice Harlan's concurring opinion in *Hunter* v. *Erickson*, 393 U. S. 385, 393 (1969), on the objective indicia that the governmental action was grounded on neutral principle. In the case at bar, this problem is not as knotty as it often is. Uni-Gov satisfies the neutral principle standard, and the search for collective legislative intent, which able counsel must have made, seems to have turned up no evidence whatsoever of racially discriminatory purpose on the part of anyone responsible for the legislation. The housing siting decisions are in a similar posture.

> constitutional principle or precedent." *Id.* at 746-747 (footnote omitted).

That *Milliken* controls here, apart from the additional evidence on Uni-Gov and public housing, was of course recognized in our decision on the second appeal, in which we reversed the portion of the District Court's order calling for interdistrict relief outside the Uni-Gov territory. That decision was a recognition that, in the language of *Milliken*, "[t]he constitutional right of the Negro respondents residing in [IPS] is to attend a unitary school system in that district," *id.*, and an interdistrict remedy is not an appropriate means of vindicating that right. The question now is: What other constitutional rights, violation of which calls for an interdistrict remedy, were shown on remand to have been violated by Uni-Gov and the siting of public housing projects? The majority does not seem to me to answer that question.

The District Court did not find that the legislative decision to exclude IPS from Uni-Gov was racially motivated.[2] The record would not have supported such a finding in view of both the absence of any direct evidence of such a motivation and the presence of such evidence as the historic context of opposition to county-wide school consolidation on non-racial grounds,[3] the

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2. Such a finding cannot be inferred from the District Court's statement that by not consolidating the schools under Uni-Gov, the General Assembly "signaled its lack of concern with the whole problem and thus inhibited desegregation with[in] IPS." Apart from doubt about whether there is any evidence that Uni-Gov had an inhibiting effect on desegregation, as distinguished from not promoting desegregation, the court has merely described an effect and not a purpose. A "lack of concern" does not amount to a racially discriminatory purpose. The state, like Michigan in *Milliken*, was under no direct constitutional duty to adopt interdistrict measures, and a duty to act could hardly arise from the fact that failure to act would "signal a lack of concern."

3. There is no evidence, as the majority recognizes, that the opposition to consolidation of Marion County School districts under the Indiana School Reorganization Act of 1959 (Ind. Code § 20-4-1-1, *et seq.*), was racially motivated. Nor is there any evidence that the failure to consolidate after that time or opposition to civil annexation was racially motivated. The District Court, in the course

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decision to leave other government units out of Uni-Gov,[4] the fact that all school boundaries elsewhere in the state were already frozen, and the non-racial reasons and the haphazard fashion in which civil annexation had taken place in the past, which had done nothing to establish rational school boundaries.[5] The appellees do not argue that the evidence shows a racially discriminatory purpose. In their briefs, filed before the decision in *Washington* v. *Davis,* the government assumes, and the intervening plaintiffs argue, that such a purpose need not be shown.

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of the hearing on remand after our decision on the second appeal, spoke of the purpose of certain exhibits as being offered "to prove or tend to prove that the present division of Marion County into eleven separate school districts is something that happened because of reasons pertaining primarily to school finances as well as to the desire of non-IPS schools to maintain local autonomy rather than for reasons of separating students based on race. . . . I presume that if the Government or the intervening plaintiffs had some evidence to the contrary that they would be cross-examining, or examining along those lines." [March 1975 Tr., Vol. III, pp. 359-360.] Neither the government nor the intervening plaintiffs offered any "evidence to the contrary" or cross-examined along the lines referred to.

4. Among those other governmental units were the Airport Authority, the Health and Hospital Corporation, the County Department of Welfare, the Building Authority, and the Library Districts. See Ind. Code § 18-4-3-14. The so-called "excluded cities" of Speedway, Perry and Lawrence [sic] retained their own local governments, which provide municipal services in those areas, although Uni-Gov has the responsibility even in those areas for air pollution regulation, building code enforcement, municipal planning, and thoroughfare control.

5. The record indicates that the reasons for this and the resulting irregularities in the boundaries of Indianapolis were that in many instances residents protested annexation because they felt the city would not provide them with services commensurate with the additional tax money they would be paying (not an uncommon reason for opposition to annexation by municipalities large and small throughout the country), and in other instances commercial developers sought and gained the annexation of land they owned because they wanted benefits that could be obtained through annexation. Thus whether this land was annexed depended in large part upon the position taken by the owners of the land affected. [March 1976 Tr., Vol. II, pp. 219-220.]

A search in the opinion of this court's majority for a finding of racially discriminatory purpose will be unproductive. The majority finds (text at notes 9 and 10) that the General Assembly did not want IPS boundaries to expand with the city boundaries whether or not Uni-Gov was adopted[6] but does not follow with a statement that this desire or the actions effectuating it were racially motivated. Instead it goes on to state, citing *Milliken,* that "Uni-Gov and its companion 1969 legislation were 'a substantial cause of interdistrict segregation' . . . and 'contributed to the separation of the races by . . . redrawing school lines. . . .' "[7] But under *Milliken,* as explained in *Washington* v. *Davis,* cause and effect are not enough. A racially discriminatory purpose is necessary. The closest the majority comes to finding a racially discriminatory purpose is in the abstract statement, at the end of the paragraph containing the three hypotheticals, that "a city should not be permitted to extend its boundaries in order to avoid desegregation." I believe that if this court intended to find as a fact that Uni-Gov was adopted with a racially discriminatory purpose, in the face of the failure of the District Court to find, and of the appellees to argue, that there was such a purpose, it would do so directly and state the evidentiary basis for that finding. As stated above, I believe there is no such basis in the record.

The majority attempts to avoid the necessity of finding discriminatory purpose by postulating an affirmative duty to desegregate under *Green* v. *County School Board,* 391 U. S.

6. This inference is drawn from the adoption of Chapter 52, 1969 Acts (Ind. Code § 20-3-14-9) seven days before the adoption of Uni-Gov and the adoption of Chapter 239, 1969 Acts (Ind. Code § 18-5-10-25). The effect of these two acts was to eliminate the automatic expansion of IPS boundaries to match the expansion of city boundaries and to limit remonstrances against annexations. These acts were rendered nugatory by the adoption of Uni-Gov.

7. Failing to redraw the school district lines does not seem to me to be "redrawing school district lines," but this is not important to an analysis of the problem, because the controlling question is whether, however the legislature's action is described, it was taken with a racially discriminatory purpose.

430 (1968), and the Indiana statutes. It is doubtful that the Indiana legislature could impose on itself by statute the duty to pass additional statutes, and, if it could, violation of such a duty would not give rise to a federal constitutional claim. *Milliken's* teaching is that the state's constitutional duty under *Green* is commensurate with the violation, which, apart from the Uni-Gov events themselves, was a violation of the right to attend a unitary school system within IPS. Under *Milliken*, there can be no affirmative duty to use interdistrict means to remedy intradistrict violations; for if such a duty existed, the State of Michigan surely violated it in that case, which would have mandated the interdistrict remedy rejected by the Supreme Court, and there was no reason in the case at bar to exclude the territory outside Uni-Gov from the scope of our remand on the second appeal.

Evans v. *Buchanan*, 393 F. Supp. 428 (D. Del. 1975), *aff'd*, 96 S. Ct. 381 (1975), on which the majority relies, does not in my opinion support affirmance. That case, unlike the case at bar, involved a prior interdistrict violation mandating the adoption of interdistrict measures by state authorities. The district court opinion in *Evans* shows *de jure* segregation before *Brown* v. *Board of Education*, 347 U. S. 483 (1954), was practiced on an interdistrict basis in the Wilmington area. 393 F. Supp. at 437. The state failed to carry its burden of showing that these past acts of segregation had become so attenuated that "the current segregation is in no way the result of those past segregation actions," *Keyes* v. *School District No. 1, supra*, 413 U. S. at 211, n. 17; in fact, post-*Brown* acts contributed to continued interdistrict segregation, see 393 F. Supp. at 434-436. Consequently, there was an affirmative duty to remedy the interdistrict violation, and the Delaware reorganization statute, by barring consolidation as a way of doing so, "contravene[d] the implicit command of *Green* v. *County School Board* . . . that all reasonable methods be available to formulate an effective remedy." *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43, 46 (1971).

The majority relies on the "racial impact" theory espoused by the district court in *Evans*. The summary affirmance of the three-judge district court's judgment does not necessarily imply approval of that court's reasoning, and that reasoning clearly cannot stand after *Washington* v. *Davis*.

In short, there is no finding and no evidence that the exclusion of IPS from Uni-Gov was racially motivated, and by all objective criteria Uni-Gov was racially neutral state action. Uni-Gov left untouched the boundaries of IPS, which had been established for racially neutral reasons. The changes in civil boundaries and reallocations of civil governmental functions made by Uni-Gov had no effect on the constitutional rights of school children in IPS.

Public Housing

The District Court, while unconvinced by the reasons given for the selection by the Housing Authority of certain sites near the periphery of the City of Indianapolis, made no findings that any of the Housing Authority's decisions were racially motivated. As the majority notes, under federal statute (42 U. S. C. § 1415(7)(b)(i)) and HUD guidelines, the Housing Authority could not obtain federal funds for a project in the absence of a cooperation agreement with the local governmental authority obligating the latter to provide essential governmental services; and as the District Court found, "Suburban Marion County officials have refused to cooperate with HUD on the location of such projects." It is apparent from the record and the District Court's findings that this was the real reason housing projects were built only within the City of Indianapolis before the effective date of Uni-Gov. There was no finding and no evidence that the refusals were racially motivated. Failure of local authorities to enter into these agreements, without more, does not give rise to an inference of racially discriminatory purpose, even though the projects are to be occupied by large numbers of blacks. See *James* v. *Valtierra, supra,* 402 U. S. at 141; see also *Metro-*

politan Housing Development Corp. v. *Village of Arlington Heights,* 517 F. 2d 409, 412-413 (7th Cir. 1975), *cert. granted,* 96 S. Ct. 560 (1975). As these cases hold, the state's location of low-rent housing projects for racially neutral reasons, even though it has a disparate effect on minority groups is not subject to strict scrutiny. *James* v. *Valtierra, supra,* 402 U. S. at 141; *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights, supra,* 517 F. 2d at 413.[8] As the majority notes, the record is silent as to why no housing projects were commenced within IPS since the effective date of Uni-Gov. Absent a showing of discriminatory intent, I find no ground on which to sustain the injunction against the Housing Authority.

Relief

In the absence of an interdistrict violation, there should be no interdistrict relief against the school corporation defendants. If I believed the majority were correct in finding interdistrict violations, I would agree that the remedy ordered by the District Court is within its discretion and would not have this court substitute its discretionary judgment for that of the District Court

8. The majority does not rely on other acts of the state and private parties that had the effect of confining blacks to the IPS area, to which the brief of the United States refers. These acts which include recording racial covenants, discriminatory FHA loan practices and private discrimination by brokers, sellers, and others, were referred to by the District Court as "customs and usages of both the officials and inhabitants of such areas" which "discourage[d] blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court." While the District Court was no doubt correct in this statement, the findings referred to and the evidence supporting it were all in the record at the time of the last appeal, when we held that *Milliken* precluded relief outside Marion County, and are similar to findings and evidence in *Milliken.* See 418 U. S. at 724, 728 n. 7. If these facts had sufficed to justify an interdistrict remedy, the Supreme Court in *Milliken* would presumably either have affirmed on the familiar principle that a reviewing court will affirm on any basis supported by the record, even if not relied on by the lower court, or else would have remanded for further consideration of the housing issue. See, *e.g., Dandridge* v. *Williams,* 397 U. S. 471, 475 n. 6 (1970).

by ordering only the voluntary-transfer remedy urged by the government. In this connection, I do note that even when no constitutional violation has occurred, Indiana law provides relief to a student who is prevented by school district lines from attending the school nearest his home, Ind. Code § 20-8.1-6-1, *et seq.*, and the school authorities seem to be obligated to grant such relief. *State ex rel. Smitherman* v. *Davis,* 283 Ind. 563, 571, 151 N. E. 2d 495, 498 (1958).

I further believe that since the Housing Authority, unlike HUD in *Hills* v. *Gautreaux,* 44 U. S. L. W. 4480 (U. S. April 20, 1976), has not been found to have engaged in purposefully discriminatory and therefore unconstitutional conduct, no relief against that agency is warranted.

UNITED STATES DISTRICT COURT,
Southern District of Indiana,
Indianapolis Division.

No. IP 68-CA-225.

UNITED STATES OF AMERICA,

Plaintiff,

DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Intervening Plaintiffs,

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; KARL R. KALP, as Superintendent of Schools; MARTHA MCCARDLE, as President of The Board of School Commissioners; WILLIAM M. S. MYERS, CARL J. MEYER, PAUL E. LEWIS, LESTER E. NEAL, CONSTANCE R. VALDEZ, W. FRED RATCLIFF, Members of The Board of School Commissioners of the City of Indianapolis,

Defendants,

OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN

TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body;

Added Defendants,

CITIZENS FOR QUALITY SCHOOLS, INC.;

Intervening Defendant,

COALITION FOR INTEGRATED EDUCATION;

Amicus Curiae.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA,

Cross-Claimants,

vs.

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

Cross-Defendants.

MEMORANDUM OF DECISION.

This case comes before the Court for further hearing, pursuant to the direction of the Court of Appeals for the Seventh Circuit. 503 F. 2d 68 (1974) cert. den. ..... U. S. ....., 43 USLW 3571 (April 21, 1975). The previous history of the case, and of various related actions, is fully set out at 503 F. 2d 71-75, and will not be repeated here. The names of certain defendants sued in a representative capacity, and whose terms have expired, have been deleted and their successors substituted.

This Court was specifically directed to determine whether the establishment of the Uni-Gov boundaries of the City of Indianap-

olis[1] without a like re-establishment of Indianapolis Public Schools boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken* v. *Bradley*, 418 U. S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974). Pursuant to such direction, a further evidentiary hearing was held, beginning March 18, 1975, and the parties have submitted both oral argument and briefs, all of which have been considered. The Court has also given consideration to other matters raised by the pleadings and evidence, and to matters of Indiana Law, all as will more fully appear.

The defendant Board of School Commissioners (IPS) on September 29, 1971, brought into the case as additional defendants, The Metropolitan Development Commission of Marion County (Commission) and The Housing Authority of the City of Indianapolis (HACI), and by way of a cross-complaint charged them with implementing policies which contributed to the segregation of IPS. Declaratory relief was demanded. These issues were not taken up heretofore, but in its pretrial entry of December 13, 1974 the Court ruled that, in addition to the Uni-Gov issue, the issue of the effect, if any, of the housing and zoning laws, rules, regulations and customs in Marion County, Indiana and its various political subdivisions upon the de jure segregation of IPS, would be considered. The greater part of the evidence introduced at the March hearing was on the latter subject.

The issue regarding housing and zoning laws was not mooted by *Milliken*. To the contrary, the concurring opinion of Mr.

1. The boundaries of the city, pursuant to Uni-Gov, are co-extensive with the boundaries of Marion County, except that the cities of Beech Grove and Lawrence ("excluded cities") and the unincorporated town of Speedway ("excluded town") are permitted to carry on as separate municipal corporations within the territory of the consolidated City of Indianapolis. Citizens of these communities have a dual status—for example, a Beech Grove voter may vote for Mayor of Indianapolis, members at large of the City County Council, Mayor of Beech Grove, and city councilmen of Beech Grove.

Justice Stewart, which constituted the decisive vote as between an otherwise evenly balanced Court, stated, "Were it to be shown . . . that state officials had contributed to the separation of the races by drawing or redrawing school district lines . . .; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate." 418 U. S. at 755.

The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI is located within IPS territory, in some instances just across the street from territory served by one of the added defendant school corporations. Each of such locations was approved—in some instances selected in the first place—by the added defendant Commission. The latter institution has had county-wide zoning jurisdiction at all times during the construction of 10 out of the 11 public housing projects for families, and HACI has at all times had the authority to erect public housing within the City of Indianapolis, and within five miles of the corporate limits of such city. The residents of said public housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.

The evidence in the record, as taken in all hearings, clearly shows that the suburban Marion County units of government, including the added defendant school corporations, have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban

Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court.

In its most recent opinion, 503 F. 2d at 80, the Court of Appeals specifically concluded, with this Court, that state officials of the State of Indiana "have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries. . . ." Inasmuch as certiorari has been denied by the Supreme Court, the finding that the State has promoted segregation and inhibited desegregation within IPS is, quite obviously, the law of the case. The new findings of this Court that the Commission and HACI have been guilty of such acts simply amplifies such earlier findings. The action of these agencies in confining poor blacks to the inner city has directly and proximately contributed to cause the suburban school districts within Marion County, other than Washington Township and Pike Township, to be and remain segregated white schools, with segregated white faculties and administrative staffs.

The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons. However, the General Assembly of Indiana, with its members elected on a state-wide basis, was not, or should not have been, subservient to local pressures, and undoubtedly could have legislated a county-wide school system for Marion County as easily as it legislated a county-wide civil government. Under existing law, both Federal as expressed in *Brown* v. *Board of*

Education, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), and in *Green* v. *County School Board*, 391 U. S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968), and the law of Indiana as expressed in Acts 1949, Ch. 186, p. 603, Burns Ind. Stat. Ann. §§ 28-6106-28-6112 (1970), it had a duty to alleviate the segregated condition then existing in IPS. When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with [*sic*] IPS.

The Court finds that the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited inter-district remedy within all of Marion County, Indiana, as hereafter described.

Recently, the General Assembly has taken some steps to meet its duty under the law—specifically by passing P. L. 94 of the Acts of 1974, Burns Ind. Stat. Ann. §§ 28-5031-28-5040, I. C. 1971, 20.-8.1-6.5-1, et seq., as added 1974. The Court of Appeals in its opinion at 503 F. 2d 74 refers to this statute as "rigidly limited in its application," which may well be, but in any event it does expressly recognize the power both of United States district courts and of the courts of the State to make orders regarding the transfer of pupils from one school corporation to another if certain conditions be found to exist, and affords a State policy and means for paying the costs of such inter-district relief, all of which was lacking in *Milliken*.

Specifically, the statute provides a means and method whereby a transferor school corporation may pay a transferee school corporation for the cost of education of a pupil transferred from the one to the other in compliance with a court order issued under the following conditions:

(1) In a suit where the transferor or transferee corporation or corporations are parties, the Court must have found the following:

(a) A transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders;

(b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor corporation; and

(c) The Fourteenth Amendment compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

In the case at hand, we have a suit in which all of the school corporations in Marion County, Indiana are parties, and in which this Court has made, and now reiterates, the following findings:

(a) The defendant Board of School Commissioners of Indianapolis, Indiana (IPS) has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders. *United States* v. *Board of Sch. Com'rs, Indianapolis, Ind.*, 332 F. Supp. 655 (S. D. Ind. 1971), aff'd 474 F. 2d 81 (7 Cir.), cert. den. 413 U. S. 920, 93 S. Ct. 3066, 37 L. Ed. 2d 1041 (1973).

(b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of IPS. "In the long haul, it won't work." 332 F. Supp. at 678.

This Court found as a fact in its opinion of July 20, 1973, 368 F. Supp. 1197, et seq., that within the IPS boundaries resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or less. That finding has not been challenged by anyone. Therefore, in a school corporation in which the percentage of black pupils has now reached more than 42% over all, and with the Court of Appeals having ordered this Court

to take further steps to desegregate the same, 503 F. 2d 80, the Court is placed in an impossible situation unless the transfer for education of a substantial number of black IPS pupils to school corporations other than IPS is accomplished.

The Court therefore makes the following additional finding:

(c) The Fourteenth Amendment compels the Court to order IPS to transfer a substantial number of its black students to various added defendant school corporations for education in order to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

The Court of Appeals has called the attention of this Court to the rule of law that "white flight" is not an acceptable reason for failing to dismantle a dual school system. 503 F. 2d 80, citing *United States* v. *Scotland Neck City Board of Education*, 407 U. S. 484, 491, 92 S. Ct. 2214, 2218, 33 L. Ed. 2d 75 (1970). However, it does not follow that this Court must ignore the probability of white flight in attempting to formulate guidelines for IPS to follow in accomplishing the final desegregation of its schools. In other words, as this Court sees it, white flight may not be used as an excuse for inaction; it may, however, supply the reason for a particular kind of action.

This approach requires the Court, once again, to review applicable statistics. "The Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy . . ." *North Carolina Bd. of Ed.* v. *Swann*, 402 U. S. 43, 91 S. Ct. 1284, 28 L. Ed. 586 2d (1971).

For the school year 1974-75, there were 77,732 pupils enrolled in IPS, excluding kindergarten and special education students. Of these 44,756, or 57.57%, were white and 32,976, or 42.43%, were black. Virtually all schools had an enrollment of at least 15% black pupils, and 19 elementary schools and one high school had enrollments in excess of 80% black. As

the Court understands the order of the Court of Appeals, this group of 20 schools must be further desegregated. As stated above, this Court has previously found that to require all schools to enroll about 42.43% black pupils would immediately accelerate white flight and unbalance the entire system beyond saving. The Court respectfully declines to stultify itself by giving any such direction.

The Metropolitan School Districts of Washington Township and Pike Township are integrating rather rapidly, as a result of demographic changes, so that Washington had a black percentage of approximately 15% and Pike a black percentage of approximately 12% for the past school year. These percentages seem likely to increase for the coming year. If the percentage of black students in the other suburban districts within Marion County were equivalent to that of Washington Township, approximately 9,525 black students would need to be transferred to such districts. The Court finds that the Fourteenth Amendment compels it to order IPS to transfer, and for the added defendant school corporations, other than Pike and Washington, to receive approximately such number of black students, over a period of time, in order to effect a plan of desegregation within IPS which is acceptable within the meaning of such amendment.

Transfers shall not include kindergarten nor special education students, and such students shall not be counted for the purpose of determining the number of transferees to each school corporation. Further, for the school year 1975-76, transfers will be limited to students in grades 1-9, inclusive, for a total of about 6,533 students, with the understanding that a student once transferred to a suburban school corporation will continue in such corporation until graduation from high school, unless the residence of such student is moved from IPS.

The number of students to be transferred to a particular school corporation shall be in such number as to cause the total enrollment of pupils in such school corporation, after the transfers have been accomplished, to be approximately 15% black. As an example, Beech Grove City Schools for the school year

1974-75 had an all white enrollment of 1,865 in grades 1-9, excluding special education. The 1,865 should be 85% of the school population after transfer; therefore 1% would be 21.9411, and 15% would be 15 x 21.9411 or 329. Approximately 329 black students would be transferred from IPS to Beech Grove in grades 1-9 for the coming school year. For the ensuing years, the original transferees would continue in the Beech Grove schools, and a new first grade group in an appropriate number would be transferred. Transfers by grade should be proportionate to the number of students enrolled per grade in the transferee schools for the past school year. Fortunately, the reports on classroom space filed by the added defendants reflects that, without exception, there is ample space available in which to house the transferees; also, IPS has ample transportation facilities available.

It is possible that transfers of black students to Washington Township should be made for education at the J. Everett Light Career Center; ruling on this point is reserved pending clarification as to certain statistical information in the record.

With regard to the present transfer of pupils, as above described and as will be more particularly set out in an accompanying order and judgment, the respective superintendents of the transferee school corporations involved, or their nominees, are directed to meet with the superintendent of IPS, or his nominees, forthwith in order to work out the exact names, numbers, and grades of pupils to be transferred. Reasonable deviations from exact statistical scheduling are anticipated, and may be agreed upon, subject to the approval of the Court. Disagreements, if any, shall be promptly referred to the Court for resolution. The transfers shall be effective, and transfer of pupils shall begin on the first day of the 1975-76 school year at each of the various transferee schools.

Once the transfer pupils have been identified, the defendant IPS is directed to submit to the Court a final plan for desegregation of the remaining schools within IPS. Alternate plans may

be submitted, in the discretion of IPS. Such plan or plans shall consider the high schools, as well as elementary schools. Kindergarten students and special education students need not be taken into account in computing black-white ratios in the various schools. Such plan or plans shall be submitted on or before October 15, 1975 and, if one be approved, it shall be put into effect at the beginning of the second semester of the 1975-76 school year, except as the Court may otherwise order.

As previously found, the location by HACI of all of its public housing facilities within IPS territory has had a major influence toward keeping black students confined within IPS, while at the same time keeping the suburban school systems virtually all white. Such conduct should and will be enjoined, so as to prohibit HACI from locating any additional public housing units within the boundaries of IPS. Furthermore, HACI should and will be enjoined from reopening Lockefield Gardens, a public housing project which is now vacant, to tenants other than the elderly.

The case for the intervening Buckley plaintiffs and their class was filed and has been presented by John O. Moss and John Preston Ward. The Court previously found them entitled to recover their reasonable attorneys fees and expenses, pursuant to 20 U. S. C. § 1617, but no fees have as yet been awarded, and the Court of Appeals has requested a further finding on the issue. 503 F. 2d 86. It is the Court's opinion that the Buckley plaintiffs should be regarded as the "prevailing parties," within the meaning of such statute, if the rulings of this Court relating to transfer of pupils become final, since they are the only parties who have contended for a remedy going beyond the IPS strait jacket.

Orders will be entered in accordance with this memorandum.

Dated this 1st day of August, 1975.

/s/ S. HUGH DILLIN,
S. Hugh Dillin,
Judge.

UNITED STATES DISTRICT COURT,
Southern District of Indiana,
Indianapolis Division.

* * (Title Omitted in Printing) * *

JUDGMENT.

The Court having this day filed a memorandum of decision in the above entitled action (Indianapolis IV), containing various findings requiring orders and judgments, such orders and judgments are hereinafter set out.

Recognizing that some or all of the parties to this proceeding may wish to appeal the judgments entered herein by this Court as to them, and as a convenience to all parties, this Court will designate by separate subnumber that particular judgment directed against each particular defendant or defendants, in order that the parties appealing may properly designate in any notice of appeal filed herein that particular judgment or judgments so appealed. The defendant The Board of School Commissioners of the City of Indianapolis, Indiana will be referred to as "IPS."

a. IP 68-C-225A. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Decatur Township, Marion County, Indiana, 567 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

b. IP 68-C225B. It is ordered and adjudged that IPS is directed to transfer to The Franklin Township Community

School Corporation, Marion County, Indiana, 326 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

c. IP 68-C225C. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Lawrence Township, Marion County, Indiana, 930 negro students to be enrolled in grades 1-9 for the 1975-76 school years, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

d. IP 68-C-225D. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Perry Township, Marion County, Indiana, 1,555 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

e. IP 68-C-225E. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Warren Township, Marion County, Indiana, 1,206 negro students to be enrolled in grade 1-9 for the 1975-76 school year,

and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

f. IP 68-C-225F. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Wayne Township, Marion County, Indiana, 1,383 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

g. IP 68-C-225G. It is ordered and adjudged that IPS is directed to transfer to the School City of Beech Grove, Marion County, Indiana, 329 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

h. IP 68-C-225H. It is ordered and adjudged that IPS is directed to transfer to the School Town of Speedway, Marion County, Indiana, 237 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered

to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

i. IP 68-C-225I. It is ordered and adjudged that IPS prepare and file with the Court, on or before October 15, 1975, a plan, or alternative plans, for the final desegregation of its schools, taking into account the transfer of pupils ordered herein.

j. IP 68-C-225J. It is ordered and adjudged that The Housing Authority of the City of Indianapolis be, and it is permanently enjoined from constructing or in any manner acquiring any structure within the area served by IPS for the purpose of offering the same, or any parts or portions thereof, for rent as a family type public housing project.

k. IP 68-C-225K. It is ordered and adjudged that The Housing Authority of the City of Indianapolis be, and it is permanently enjoined from renovating its presently owned public housing project known as Lockefield Gardens for use as a family type public housing project, or to utilize the same, or any parts or portions thereof, for such purpose. Nothing herein contained shall be construed as enjoining the use of such structure for public housing for the elderly.

The Court retains continuing jurisdiction of this action, and the parties thereto, together with the right to modify or supplement any orders or judgments herein or heretofore made.

Dated this 1st day of August, 1975.

/s/ S. HUGH DILLIN,
S. Hugh Dillin,
Judge.

CONSTITUTIONAL PROVISION.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, § 1.

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTE.

42 U. S. C. § 1415

"In order to insure that the low-rent character of housing projects will be preserved, and that the other purposes of this chapter will be achieved, it is provided that—

* * * * *

Local responsibilities and determinations.

(7) In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise—

* * * * *

(b) The Authority shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter;"

42 U. S. C. 1437f

§ 1437f. Lower-income housing assistance—Authorization for assistance payments

(a) For the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing, newly constructed, and substantially rehabilitated housing in accordance with the provisions of this section.

Authorization for contracts for assistance payments

(b)(1) The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section. In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public agency by this section.

(2) To the extent of annual contributions authorizations under section 1437c(c) of this title, the Secretary is authorized to make assistance payments pursuant to contracts with owners or prospective owners who agree to construct or substantially rehabilitate housing in which some or all of the units shall be available for occupancy by lower-income families in accordance with the provisions of this section. The Secretary may also enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to such owners or prospective owners.

Contents and purposes of contracts for assistance payments; amount and scope of monthly assistance payments

(c)(1) An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market area suitable for occupancy by persons assisted under this section, except that the maximum monthly rent may exceed the fair market rental by more than 10 but not more than 20 per centum where the Secretary determines that special circumstances warrant such higher maximum rent or that such higher rent is necessary to the implementation of a local housing assistance plan as defined in section 1439(a)(5) of this title. Proposed fair market rentals for an area shall be published in the Federal Register with reasonable time for public comment, and shall become effective upon the date of publication in final form in the Federal Register.

(2)(A) The assistance contracts shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

(B) The contract shall further provide for the Secretary to make additional adjustments in the maximum monthly rent for units under contract to the extent he determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes,

utility rates, or similar costs which are not adequately compensated for by the adjustment in the maximum monthly rent authorized by subparagraph (A).

(C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

(3) The amount of the monthly assistance payment with respect to any dwelling unit, in the case of a large very low-income family, a very large lower income family, or a family with exceptional medical or other expenses, as determined by the Secretary, shall be the difference between 15 per centum of one-twelfth of the annual income of the family occupying the dwelling unit and the maximum monthly rent which the contract provides that the owner is to receive for the unit. In the case of other families, the Secretary shall establish the amount of the assistance payment as the difference between not less than 15 per centum nor more than 25 per centum of the family's income and the maximum rent, taking into consideration the income of the family, the number of minor children in the household, and the extent of medical or other unusual expenses incurred by the family. Reviews of family income shall be made no less frequently than annually (except that such reviews may be made at intervals no longer than two years in the case of families who are elderly families).

(4) The assistance contract shall provide that assistance payments may be made only with respect to a dwelling unit under lease for occupancy by a family determined to be a lower income family at the time it initially occupied such dwelling unit, except that such payments may be made with respect to unoccupied units for a period not exceeding sixty days (A) in the event that a family vacates a dwelling unit before the expiration date of the lease for occupancy or (B) where a good faith effort is being made to fill an unoccupied unit.

(5) Assistance payments may be made with respect to up to 100 per centum of the dwelling units in any structure upon the application of the owner or prospective owner. Within the category of projects containing more than fifty units and designed for use primarily by nonelderly and nonhandicapped persons, the Secretary may give preference to applications for assistance involving not more than 20 per centum of the dwelling units in a project. In according any such preference, the Secretary shall compare applications received during distinct time periods not exceeding sixty days in duration.

(6) The Secretary shall take such steps as may be necessary, including the making of contracts for assistance payments in amounts in excess of the amounts required at the time of the initial renting of dwelling units, the reservation of annual contributions authority for the purpose of amending housing assistance contracts, or the allocation of a portion of new authorizations for the purpose of amending housing assistance contracts, to assure that assistance payments are increased on a timely basis to cover increases in maximum monthly rents or decreases in family incomes.

(7) At least 30 per centum of the families assisted under this section with annual allocations of contract authority shall be very low-income families at the time of the initial renting of dwelling units.

(8) To the extent authorized in contracts entered into by the Secretary with a public housing agency, such agency may purchase any structure containing one or more dwelling units assisted under this section for the purpose of reselling the structure to the tenant or tenants occupying units aggregating in value at least 80 percentum of the structure's total value. Any such resale may be made on the terms and conditions prescribed under section 1437c(h) of this title and subject to the limitation contained in such section.

Required provisions and duration of contracts for Assistance Payments

(d)(1) Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that—

(A) the selection of tenants for such unit shall be the function of the owner, subject to the provisions of the annual contributions contract between the Secretary and the agency;

(B) the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy;

(C) maintenance and replacement (including redecoration) shall be in accordance with the standard practice for the building concerned as established by the owner and agreed to by the agency; and

(D) the agency and the owner shall carry out such other appropriate terms and conditions as may be mutually agreed to by them.

(2) Each contract for an existing structure entered into under this section shall be for a term of not less than one month nor more than one hundred and eighty months.

Restrictions on contracts for assistance payments

(e)(1) The Secretary shall not contract to make assistance payments with respect to a newly constructed or substantially rehabilitated dwelling unit for a term of less than one month or more than two hundred and forty months. In the case of a project owned by, or financed by a loan or loan guarantee from, a State or local agency, the term may not exceed four hundred and eighty months.

(2) The contract between the Secretary and the owner with respect to newly constructed or substantially rehabilitated dwell-

ing units shall provide that all ownership, management, and maintenance responsibilities, including the selection of tenants and the termination of tenancy, shall be assumed by the owner (or any entity, including a public housing agency, approved by the Secretary, with which the owner may contract for the performance of such responsibilities).

(3) The construction or substantial rehabilitation of dwelling units to be assisted under this section shall be eligible for financing with mortgages insured under the National Housing act. Assistance with respect to such dwelling units shall not be withheld or made subject to preferences by reason of the availability of mortgage insurance pursuant to section 1715z-9 of Title 12 or by reason of the tax-exempt status of the bonds or other obligations to be used to finance such construction or rehabilitation.

(4) Nothing in this chapter shall be deemed to prohibit an owner from pledging, or offering as security for any loan or obligation, a contract for assistance payments entered into pursuant to this section: *Provided,* That such security is in connection with a project constructed or rehabilitated pursuant to authority granted in this section, and the terms of the financing or any refinancing have been approved by the Secretary.

Definitions

(f) As used in this section—

(1) the term "lower income families" means those families whose incomes do not exceed 80 per centum of the median income for the area, as determined by the Secretary with adjustments for smaller and larger families, except that the Secretary may establish income ceilings higher or lower than 80 per centum of the median for the area on the basis of his findings that such variations are necessary because of prevailing levels of construction costs, unusually high or low family incomes, or other factors;

(2) the term "very low-income families" means those families whose incomes do not exceed 50 per centum of the median income for the area, as determined by the Secretary with adjustments for smaller and larger families;

(3) the term "income" means income from all sources of each member of the household, as determined in accordance with criteria prescribed by the Secretary;

(4) the term "owner" means any private person or entity, including a cooperative, or a public housing agency, having the legal right to lease or sublease newly constructed or substantially rehabilitated dwelling units as described in this section; and

(5) the terms "rent" or "rental" mean, with respect to members of a cooperative, the charges under the occupancy agreements between such members and the cooperative.

Regulations applicable for implementation of assistance payments

(g) Notwithstanding any other provision of this chapter, assistance payments under this section may be provided, in accordance with regulations prescribed by the Secretary, with respect to some or all of the units in any project approved pursuant to section 1701q of Title 12.

Nonapplicability of inconsistent provisions to contracts for assistance payments

(h) The provisions of sections 1437a(1), 1437c(c), and 1437d of this title, and any other provisions of this chapter, which are inconsistent with the provisions of this section shall not apply to contracts for assistance entered into under this section.

Sept. 1, 1937, c. 896, § 8, as added Aug. 22, 1974, Pub. L. 93-383, Title II, § 201(a), 88 Stat. 662.

INDIANA STATUTE.

INDIANA ACT:, 1937, Ch. 207 (Housing Authority Act) [S. 182. Approved March 11, 1937], recodified as IC 1971, 18-7-11..

Chapter 11. Housing Authorities Act.

Sec. 1. This act shall be known and may be cited as the "Housing Authorities Act." *(Source: Acts 1937, c. 207, s. 1).*

Sec. 2. It is hereby declared: (a) That there exist in the state insanitary or unsafe dwelling accommodations and that persons of low income are forced to reside in such insanitary or unsafe accommodations; that within the state there is a shortage of safe or sanitary dwelling accommodations available at rents which persons of low income can afford and that such persons are forced to occupy overcrowded and congested dwelling accommodations; that the aforesaid conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the residents of the state and impair economic values; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection and other public services and facilities; (b) That there exists now and may exist at divers times in the future, conditions, due to floods, tornadoes, fires and other disasters beyond human control, which demand the replanning and rebuilding of housing areas; (c) That these slum areas have not been cleared, nor can the shortage of safe and sanitary dwellings for persons of low income be relieved, through the ordinary operations of private enterprise, and that the construction of housing projects for persons of low income (as herein defined) would therefore not be competitive with ordinary operation of private enterprise; (d) That the clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of

safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired; that it is in the public interest that work on such projects be commenced as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest and welfare for the provisions hereinafter enacted, is hereby declared a matter of legislative determination. *(Source: Acts 1937, c. 207, s. 2).*

Sec. 3. The following terms, wherever used or referred to in this act shall have the following meaning, unless the context clearly requires otherwise:

(a) "Authority" or "housing authority" shall mean any of the public corporations created by section 4 of this act.

(b) The "board" shall mean the state housing board of Indiana.

(c) "City" shall mean any city; "town" shall mean any town; and "county" shall mean any county in this state. "The city" shall mean the particular city for which a particular housing authority is created; "the town" shall mean the particular town for which a particular housing authority is created; "the county" shall mean the particular county for which a particular housing authority is created.

(d) The "governing body" shall mean, in the case of a city, the common council, in the case of a town, the town board of trustees, and in the case of a county, the county council.

(e) "Mayor" shall mean the mayor of the city or the officer thereof charged with the duties customarily imposed on the mayor or executive head of the city.

(f) "Clerk" shall mean the clerk or clerk-treasurer of a city, the clerk-treasurer of a town, or the auditor of a county, as the case may be, or the officer charged with the duties customarily imposed on such clerk.

(g) Area of operation: (1) In the case of a housing authority of a city or town shall include such city or town and the area within five (5) miles of the territorial boundaries thereof; Provided, however, That the area of operation of a housing authority of any city or town shall not include any area which lies within the territorial boundaries of authority of any other city or town; . . . .

HUD 1972 PROJECT SELECTION CRITERIA, 24 C. F. R. § 200.700, et seq.

§ 200.700 Purpose.

The purpose of this subpart is to set forth the project selection criteria to be used in evaluating (a) requests for priority registration and reservation of contract authority for projects under section 235(i) of the National Housing Act; (b) requests for early feasibility and reservation of contract authority for projects under section 236 of the Act; (c) requests for reservation of contract authority for rent supplement projects; and (d) applications for low-rent housing assistance under the U. S. Housing Act of 1937.

§ 200.705 Authority.

The regulations in this subpart are issued pursuant to section 7(d) of the Department of Housing and Urban Development Act of 1965, 42 U. S. C. 3535(d), sections 235(i) and 236 of the National Housing Act (12 U. S. C. 1715z(i) and 1715z-1); and the U. S. Housing Act of 1937 (42 U. S. C. 1401 et seq.). They implement Executive Order 11063, 27 F. R. 11527; title VIII of the Civil Rights Act of 1968, 42 U. S. C. 3608; and the Department of Housing and Urban Development regulations approved by the President under title VI of the Civil Rights Act of 1964, 42 U. S. C. 2000d-1, in Part 1 of this title.

§ 200.710 Requests for priority registration, early feasibility, or reservation of contract authority for section 235(i), rent supplement, or section 236 projects and evaluation of application for low-rent public housing.

A request for priority registration, early feasibility, or reservation of contract authority for section 235(i), rent supplement, or section 236 projects and applications for low-rent public housing shall be evaluated and processed in accordance with the following Evaluation of Requests:

U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL HOUSING ADMINISTRATION

Evaluation of requests for priority registration, early feasibility of contract authority (section 235(i), rent supplement, section 238) or evaluation of application for low-rent housing.

☐ 235(i) ☐ 221d3 rent supplement ☐ low-rent public housing ☐ rent supplement.

Sponsorship: ☐ Profit ☐ Nonprofit ☐ Lim. Div. ☐ Public

☐ Priority registration ☐ Early feasibility ☐ Reservation ☐ App. public housing

Area or insuring office _____

Applicant (name and address) _____

Census tract (where available) _____

Date of initial application _____

Identification of subdivision/location of proposed project _____

_____

Case or application number _____

General instructions: In evaluating proposals involving five (5) or more dwelling units (25 or more in the case of public housing acquisition or leasing), the Area or Insuring Office shall utilize the following Project Selection Criteria. Enter a

brief explanation on the lines provided of the way in which the proposal satisfies each applicable consideration, so that the factual basis for the evaluation and rating assigned is clear. Attach supporting documentation and extra sheet(s), if necessary for a complete explanation. Evaluate each criterion by checking the appropriate box—Superior, Adequate, or Poor.

Final feasibility approval is dependent upon satisfying all statutory and administrative requirements which are a normal part of processing. Rehabilitation projects, Indian Reservation Housing, section 235 existing housing, public housing acquisition or leasing of existing housing of fewer than 25 units not requiring rehabilitation, and proposed construction project of fewer than five (5) dwelling units are excluded.

1. *Need for low(er) income housing* ☐ Superior

☐ Adequate ☐ Poor

Objective: To identify the proposed projects which will best serve the most urgent unmet needs for housing for lower(er) income households.

(A) A *superior* rating shall be given to a proposed project:

(1) Which responds well to the most urgent housing needs of low(er) income households in the market area in terms of number of bedrooms and structure type; or, ...

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(2) As to which there is documented evidence that the housing is needed as a relocation resource to serve families displaced or to be displaced by governmental action, including families or individuals being displaced by the proposed project, and that the applicant will give preference to those so displaced .....

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(B) An *adequate* rating shall be given to a proposed project which responds to housing needs of low(er) income households

in the market area in terms of number of bedrooms and structure type .....

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(C) A poor rating shall be given to a proposed project which:

(1) Does not respond to housing needs of low(er) income households in the market area; *or,* .....

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(2) Duplicates or competes unreasonably with other subsidized or comparably-priced, standard unsubsidized housing projects in the same locality in such a way as to overbuild the market .....

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2. *Minority Housing opportunities* ☐ Superior ☐ Adequate ☐ Poor

Objectives:

To provide minority families with opportunities for housing in a wide range of locations.

To open up nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination.

(A) A *superior* rating shall be given if the proposed project will be located:

(1) So that, within the housing market area, it will provide opportunities for minorities for housing outside existing areas of minority concentration and outside areas which are

already substantially racially mixed; *or*, ...

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(2) In an area of minority concentration, but the area is part of an official State or local agency development plan, and sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration .....

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(B) An *adequate* rating shall be given if the proposed project will be located:

(1) Outside an area of minority concentration, but the area is racially mixed, and the proposed project will not cause a significant increase in the proportion of minority to nonminority residents in the area; *or*, ...

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(2) In an area of minority concentration and sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, *or*, ...

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(3) In an area of minority concentration, but is necessary to meet overriding housing needs which cannot otherwise feasibly be met in the housing market area. (An "overriding need" may not serve as the basis for an "adequate" rating if the only reason the need cannot otherwise feasibly be met is that discrim-

ination on the basis of race, color or national origin renders sites outside areas of minority concentration unavailable); *or,*

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(4) In a housing market area with few or no minority group residents .....

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All "superior" and "adequate" ratings shall be accompanied by documented findings based upon relevant racial, socioeconomic, and other data and information.

(C) A *poor* rating shall be given if the proposed project does not satisfy any of the above conditions, *e.g.*, will cause a significant increase in the proportion of minority residents in an area which is not one of minority concentration, but which is racially mixed .....

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3. *Improved location for low(er) income families*

Objectives:

To avoid concentrating subsidized housing in any one section of a metropolitan area or town.

To provide low(er) income households with opportunities for housing in a wide range of locations.

To locate subsidized housing in sections containing facilities and services that are typical of those found in neighborhoods consisting largely of standard, unsubsidized housing of a similar market value.

To locate subsidized housing in areas reasonably accesible to job opportunities.

(A) A *superior* rating shall be given if the proposed project:

(1) Will be located in a section (consisting of the project neighborhood and contiguous neighborhoods) that contains little or no federally-subsidized housing and (a) the proposed project is, or will be by the occupancy date or very shortly thereafter, accessible to social, recreational, educational, commercial, and health facilities and services, and other municipal services that are equivalent to or better than those typically found in neighborhoods consisting largely of standard, unsubsidized housing of a similar market value, and (b) travel time and cost via public transportation or private auto from the neighborhood to employment providing a range of jobs for low(er) income workers is considered excellent for such families in the metropolitan area or town. (While it is important that elderly housing not be totally isolated from all employment opportunities, for such projects the requirements of (b) above need not be adhered to rigidly); *or*, ...

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(2) Is part of a New Community Development Plan approved under Title VII of the Housing and Urban Development Act of 1970 .....

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(B) An *adequate* rating shall be given to a proposed project which will be located:

(1) In a section already containing federal-subsidized housing if, with the addition of the proposed housing, the resulting number of federally-subsidized units will not establish the character of the section as one of subsidized housing and the housing will provide an expanded range of housing opportunity

for low(er) income families; *or,* .....

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(2) In an undeveloped area, but the scale of the project will not be such that it establishes the character of the section as one of subsidized housing; .....

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(3) And, in the event of either (1) or (2): (a) The project is, or will be by the occupancy date or very shortly thereafter, accessible to social recreational, educational, commercial, and health facilities and services, and other municipal services that are equivalent to those typically found in neighborhoods consisting largely of unsubsidized standard housing of a similar market value, and (b) traveltime and cost via public transportation or private auto from the neighborhood to employment providing a range of jobs for low(er) income workers is reasonable for such families in the metropolitan area or town. (While it is important that elderly housing not be totally isolated from all employment opportunities, for such projects the requirements of (b) above need not be adhered to rigidly); *or,* .....

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(4) In an Urban Renewal or Model Cities area and such housing is required to fulfill, respectively, the Urban Renewal Plan or the Comprehensive City Demonstration Program.....

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(C) A *poor* rating shall be given if:

(1) The proposed project will be located in a section char-

acterized as one of subsidized housing; *or*.....

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(2) The proposed project will establish the character of the section as one of subsidized housing; *or*, ...

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(3) Social, recreational, educational, commercial, and health facilities and services, and other municipal services: (a) are not, or will not be by the occupancy rate or very shortly thereafter, accessible to the project, or (b) although accessible to the project, are inferior to those generally found in neighborhoods consisting largely of standard, unsubsidized housing of a similar market value; *or*, ...

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(4) Travel time and cost via public transportation or private auto from the neighborhood to employment providing a range of jobs for low(er) income workers will be appreciably greater than that usually required in the metropolitan area or town .....

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4. *Relationship to orderly growth and development*

☐ Superior ☐ Adequate ☐ Poor

Objectives:

To assure that the proposed development is consistent with principles of orderly growth and development.

To prevent urban sprawl and the premature development or overdevelopment of land before supporting facilities are available.

To develop housing consistent with officially approved State or multijurisdictional plans.

To encourage formulation of area-wide plans which include a housing element relative to needs and goals for low- and moderate-income housing as well as balanced production throughout a metropolitan area.

(A) A *superior* rating shall be given if the proposed project:

(1) Will be consistent with the housing element of a local, officially-approved land use or other development plan which is consistent with metropolitan or regional plans (zoning alone does not constitute an officially-approved land use or other development plan); *or,* .....

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(2) Will be located in and be consistent with plans for a neighborhood that is undergoing improvement via Urban Renewal, Model Cities, New Communities or other similar Federal, State, or local development program; *or,* .....

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(3) Is consistent with a policy adopted by a State housing or metropolitan areawide development agency or the local governing body (especially where this policy implements a multijurisdictional approach) for providing for and dispersing housing for low- and moderate-income families .....

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(B) An *adequate* rating shall be given if the proposed project:

(1) Is consistent with a local, officially-approved land use or development plan; *or,* .....

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(2) Is consistent with sound growth patterns, although located in a community that does not have officially-approved land use or other development plans .....

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(C) A *poor* rating shall be given if the proposed project:

(1) Does not satisfy any of the above conditions; *or,* .....

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(2) Is contrary to sound growth patterns .....

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5. *Relationship of proposed project to physical environment:*

☐ Superior ☐ Adequate ☐ Poor

Objectives:

To provide an attractive and well-planned physical environment.

To prevent any adverse impact on the environment resulting from construction of the proposed housing.

To avoid site locations whose environmental conditions would be detrimental to the success of an otherwise sound project.

(A) A *superior* rating shall be given if the proposed housing will:

(1) Embody outstanding land use planning and excellent architectural treatment, *and*

(2) Be free from adverse environmental conditions, natural or manmade, such as instability, flooding, septic tank backups, sewage hazards, or mudslide; harmful air pollution, smoke or dust; excessive noise, vibration, or vehicular traffic; unsanitary rodent or vermin infestation; or dangerous fire hazards; *and,*

(3) Not, considering both long-term and short-term efforts, impact or impair ecologically valuable or significant natural areas, such as wildlife areas, ground water or surface water areas, and parklands, or significant historical or archeological areas

(B) An *adequate* rating shall be given if the proposed project will:

(1) Embody sound land use planning and good architectural treatment; *and*

(2) Be free from adverse environmental conditions that cannot be corrected; *and*

(3) Not have an unreasonably adverse impact on the environment .....

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(C) A *poor* rating shall be given if the proposed project will:

(1) Embody poor land use planning *or* poor architectural treatment; *or,* .....

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(2) Be subject to serious environmental conditions which cannot be corrected; *or,* .....

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(3) Will substantially or unreasonably disrupt the environment or ecologically valuable or unique natural areas .....

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6. *Ability to perform*

☐ Superior ☐ Adequate ☐ Poor

Objective: To produce housing promptly and to provide quality housing at a reasonable cost, taking into account Equal Opportunity guidelines and requirements.

(A) A *superior* rating shall be given if the applicant, his staff, or other personnel which he will utilize (including contractors, subcontractors, architects, consultants, etc.), and help he will receive, considered together, have demonstrated good ability in past performance (in either subsidized, unsubsidized, conventionally-financed developments or related fields), based on each of the following considerations: (a) Ability to perform

well within program target dates; (b) high quality of housing produced; (c) ability to produce housing at a cost at or below similar units of comparable quality; (d) compliance with Equal Opportunity guidelines and requirements .....

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(B) An *adequate* rating shall be given if, the applicant, his staff, or other personnel which he will utilize (including contractors, subcontractors, architects, consultants, etc.), and help he will receive, considered together have demonstrated an acceptable ability in past performance (in either subsidized, unsubsidized, conventionally-financed developments or related fields), based on each of the following considerations: (a) Ability to meet program target dates; (b) good quality of housing produced; (c) ability to produce housing at a cost equivalent to that of similar units of comparable quality; (d) compliance with Equal Opportunity guidelines and requirements. In the case of an applicant without previous experience in housing or related fields or an LHA with no units under management, an adequate rating will be given if there is no demonstrable reason to believe that it will be unable to meet the above conditions .....

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(C) A *poor* rating shall be given to any proposal which does not meet the above conditions .....

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7. *Project potential for creating minority employment and business opportunities* ☐ Superior ☐ Adequate ☐ Poor

Objectives:

To encourage housing proposals which will generate job opportunities for minority workers.

To provide opportunities for business concerns owned in substantial part by minority persons.

(A) A *superior* rating will be given if the proposal shows good potential, based on the applicant's stated, specific goals, hiring timetables, and past performance, if any, for:

(1) Providing training and/or employment for minority persons; *and* .....

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(2) Utilizing business concerns (including but not limited to the prime contractor) owned, controlled or managed in substantial part by minority persons. This potential may include training, employment and business opportunities in all phases of development, including but not limited to planning, site development, building, maintenance, and management .....

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(B) An *adequate* rating will be given if:

(1) The proposal has good potential based on the above factors, for satisfying either of the two conditions set forth for a "superior" rating; *or,* .....

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(2) The housing market area has no minority population or the area from which labor could feasibly be recruited and

business concerns feasibly contracted has a minority population so low that it would be impossible for the applicant to achieve a "superior" or "adequate" rating .....

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(C) A *poor* rating shall be given to a proposal which shows poor or no potential for satisfying any of the above conditions

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8. *Provision for sound housing management*

Objective: To encourage the development of well-managed and well-maintained projects so as to significantly increase their potential for successful, long-term operation and to foster good relations between tenants and management and the surrounding community.

(A) A *superior* rating shall be given to a proposed project which:

(1) If submitted under the section 236 or Rent Supplement programs (a) includes a management plan (based on "Management Plan Requirements") which significantly exceeds present HUD requirements and guidelines in terms of the quality of management proposed and the services to be provided; *and* (b) has a sponsor and, if applicable, management agent which have demonstrated, through past performance, superior: Maintenance policies, financial stability, tenant-management relations, and overall management practices (with due consideration for past performance in regard to avoiding defaults, need for mortgage payment relief or other significant problems); *or*,

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(2) If submitted by a Local Housing Authority, the Authority has demonstrated superior: Maintenance policies, financial stability, tenant-management relations and overall management practices

(B) An *adequate* rating shall be given to a proposed project which:

(1) If submitted under the Section 236 or Rent Supplement programs, (a) includes a management plan (based on "Management Plan Requirements"), which meets current HUD requirements and guidelines in terms of the quality of management proposed and the services to be provided; and (b) has a sponsor and, if applicable, management agent which have demonstrated their ability or show potential for meeting project management requirements; *or*,

(2) If submitted by a Local Housing Authority, (a) the Authority has demonstrated by its past performance adequate: maintenance policies, financial stability, tenant-management relations and overall management policies; *or*,

(3) If submitted by a Local Housing Authority with no units under management, the Authority demonstrates the potential to meet project management requirements .....

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(C) A *poor* rating shall be given to any proposed project which does not meet any of the above requirements .....

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SUMMARY OF RATINGS

Priority group. Check only one box shown below representing the total number of ratings assigned on the form or *disapproval.* A Superior or Adequate rating is required for all criteria.

Section 235(1)[1]

Priority group	Ratings		
	Superior	Adequate	Poor
1. ☐	7	0	0
2. ☐	6	1	0
3. ☐	5	2	0
4. ☐	4	3	0
5. ☐	3	4	0
6. ☐	2	5	0
7. ☐	1	6	0
8. ☐	0	7	0

☐ Disapproval. A *Poor* rating on any criterion.

Rent supplement, section 23d or low-rate public housing:

Priority group	Ratings		
	Superior	Adequate	Poor
1. ☐	3	0	0
2. ☐	7	1	0
3. ☐	6	2	0
4. ☐	5	3	0
5. ☐	4	4	0
6. ☐	3	5	0
7. ☐	2	6	0
8. ☐	1	7	0
9. ☐	0	8	0

☐ Disapproval. A *Poor* rating on any criterion.

1. Criterion #6 (Management) is not applicable to Section 235.

NOTE: Proposals shall be evaluated when received and shall not be stockpiled unreasonably. After rating has been assigned above, proposals in priority group 1 shall be funded ahead of those in priority group 2, proposals in priority group 2 shall be funded ahead of those in group 3, and so on. Within each group, proposals shall be funded in order of date of receipt of applications suitable for processing.

EVALUATION PREPARED BY

(Date) (Name and title)

The above ratings have been assigned with my approval.

(Date)

Director, Operations Division Area Office

or Chief Underwriter, Insuring Office

HUD 1976 LOW INCOME HOUSING REGULATION, 24 C. F. R. § 800.101, et seq.

AUTHORITY: Sec. 7(d), Department of Housing and Urban Development Act (42 U. S. C. 3535(d)); sec. 5(b), U. S. Housing Act of 1937 (42 U. S. C. 1437c(b)); sec. 8, U. S. Housing Act of 1937 (42 U. S. C. 1437(f).

SOURCE: 40 FR 19613, May 5, 1975, unless otherwise noted.

Subpart A—Applicability, Scope and Basic Policies

§ 882.101 Applicability and scope.

(a) *General.* (1) The policies and procedures contained herein are applicable to the making of Housing Assistance

Payments on Behalf of Eligible Families leasing Existing Housing pursuant to the provisions of section 8 of the U. S. Housing Act of 1937 ("Act").

(2) For the purpose of this part, "Existing Housing" means housing that is in Decent, Safe, and Sanitary condition except that it does not include housing: (i) Which is covered by an Agreement to Enter into Housing Assistance Payments Contract or by a Housing Assistance Payments Contract under Part 800, 801, 880, or 881 of this chapter, or (ii) which is owned by the PHA administering the ACC under this part, or (iii) which is subsidized under other provisions of the Act. Occupancy of housing which requires repairs in order to be made Decent, Safe, and Sanitary may be assisted under this Part only after such repairs have been made. (See also § 882.210(d).)

* * * * *

§ 882.102 Definitions.

Allowance for Utilities and Other Services ("Allowance"). An amount determined by the PHA as an allowance for the cost of utilities (except telephone) and charges for other services payable directly by the Family. Where the Family pays directly for one or more utilities or services, the amount of the Allowance is deducted from the Gross Rent in determining the Contract Rent and is included in the Gross Family Contribution.

Annual Contributions Contract ("ACC"). A written agreement betwen HUD and a PHA to provide annual contributions to the PHA to cover housing assistance payments and other expenses pursuant to the Act. (See Appendix I to this part.)

Certificate of Family Participation ("Certificate"). A certificate issued by the PHA declaring a Family to be eligible for participation in this program and stating the terms and conditions for such participation.

Congregate Housing. Housing in which some or all of the dwelling units do not have kitchen facilities and connected with which there is a central dining facility to provide meals for the occupants.

Contract. See definition of Housing Assistance Payments Contract.

Contract Rent. The rent payable to the Owner under his Contract including the portion of the rent payable by the Family. In the case of a cooperative, the term "Contract Rent" means charges under the occupancy agreements between the members and the cooperative.

Decent, Safe, and Sanitary. Housing is Decent, Safe, and Sanitary if the requirements of § 882.109 are met.

Eligible Family (Family). A family which qualifies as a Lower-Income Family and which meets the other requirements of the Act and this part. The term Family includes an elderly, handicapped, disabled, or displaced person and the remaining member of a tenant family as defined in section 3(2) of the Act. A Family's eligibility for housing assistance payments continues until the amount payable by the Family toward the Gross Rent equals the Gross Rent for the dwelling unit it occupies, but the termination of eligibility at such point shall not affect the family's other rights under its Lease nor shall such termination preclude resumption of payments as a result of subsequent changes in income or rents or other relevant circumstances during the term of the Contract.

Existing Housing. See § 882.101(a)(2).

Fair Market Rent. The rent, including utilities (except telephone), ranges and refrigerators, and all maintenance, management, and other services, which, as determined at least annually by HUD, would be required to be paid in order to obtain privately owned, existing, Decent, Safe, and Sanitary rental housing of modest (non-luxury) nature with suitable amenities. Separate Fair Market Rents shall be established for dwelling units of varying sizes (number of bedrooms) and types (e.g. elevator, non-elevator).

Gross Family Contribution. The portion of the Gross Rent payable by an Eligible Family (i.e. the difference between the

amount of the Housing Assistance Payment payable on Behalf of the Family and the Gross Rent), before deduction of shopping incentive credit, where applicable.

Gross Rent. The Contract Rent plus any Allowance for Utilities and Other Services.

HCD Act. The Housing and Community Development Act of 1974.

Housing Assistance Payments Contract ("Contract"). A written contract between a PHA and an Owner for the purpose of providing housing assistance payments to the Owner on behalf of an Eligible Family. (See Appendix II to this part.)

Housing Assistance Payment on Behalf of Eligible Family. The amount of housing assistance payment on behalf of an Eligible Family determined in accordance with schedules and criteria established by HUD. (See § 882.114.)

HUD. The Department of Housing and Urban Development or its designee.

Income. Income from all sources of each member of the household as determined in accordance with criteria established by HUD.

Lease. A written agreement between an Owner and an Eligible Family for the leasing of an Existing Housing unit in accordance with the Contract, which agreement is in compliance with the provisions of this part.

Local Housing Assistance Plan. A housing assistance plan submitted by a unit of general local government and approved by HUD under section 104 of the HCD Act or, in the case of a unit of general local government not participating under Title I of the HCD Act, a housing plan which contains the elements set forth in section 104(a)(4) of the HCD Act and which is approved by the Secretary as meeting the requirements of section 213 of that Act.

Lower-Income Family. A Family whose Income does not exceed 80 percent of the median Income for the area as deter-

mined by HUD with adjustments for smaller or larger Families, except that HUD may establish Income limits higher or lower than 80 percent on the basis of its findings that such variations are necessary because of the prevailing levels of construction costs, unusually high or low Incomes, or other factors.

Owner. Any person or entity, including a cooperative, having the legal right to lease or sublease Existing Housing.

Project Account. The account established and maintained in accordance with § 882.104.

Public Housing Agency ("PHA"). Any State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of housing for low-income Families.

Recently Completed Housing. See § 882.120.

Secretary. The Secretary of Housing and Urban Development.

Shopping Incentive Credit. See § 882.115.

Very Low-Income Family. A Family whose income does not exceed 50 percent of the median income for the area, as determined by HUD, with adjustments for smaler or larger families.

§ 882.103 "Finders-keepers" policy.

(a) A holder of a Certificate of Family Participation shall be responsible for finding an Existing Housing unit suitable to the holder's needs and desires in any area within the PHA's jurisdiction. A holder of a Certificate may select the dwelling unit which the holder already occupies if the unit qualifies as Existing Housing. A PHA may provide assistance in finding units for those Families who, because of age, handicap, or other reasons, are unable to locate approvable units and shall provide such assistance where the Family alleges that discrimination is preventing it from finding a suitable unit. Any such assistance shall be in accordance with the PHA's approved equal opportunity housing plan (see § 882.204(e)).

(b) Neither in the provision of assistance to any Family in finding units nor by any other action shall the PHA directly or indirectly reduce the Family's opportunity to choose among the available units in the housing market.

§ 882.104 Maximum total ACC commitment and project account.

(a) Maximum Total ACC Commitment. The maximum total annual contribution that may be contracted for in the ACC for Existing Housing shall not exceed the total of the Fair Market Rents for all the units plus a fee for the regular costs of PHA administration. HUD-approved preliminary costs shall be payable out of this total.

(b) Project Account. A project account will be established and maintained, in an amount as determined by the Secretary consistent with his responsibilities under section 8(c)(6) of the Act. This account shall be established and maintained by HUD as a specifically identified and segregated account, and payment shall be made therefrom only for the following purposes:

(1) Housing assistance payments;

(2) The amount of the fee for regular PHA costs of administration; and

(3) Other costs specifically authorized or approved by the Secretary.

(c) In addition, the ACC will provide that HUD will take such additional steps authorized by section 8(c)(6) of the Act as may be necessary to assure availability of funds to cover increases in housing assistance payments on a timely basis as a result of increases in Contract Rents or decrease in Family Incomes.

§ 882.105 Housing assistance payments to owners.

(a) *General.* Housing assistance payments shall be paid to an Owner in accordance with his Contract for the dwelling unit

under lease by an Eligible Family. These housing assistance payments will cover the difference between the Contract Rent and the portion of said rent payable by the Family as determined in accordance with HUD-established schedules and criteria. No section 8 assistance may be provided with respect to any unit occupied by an Owner; however, cooperatives are considered rental housing rather than owner-occupied housing for this purpose.

(b) *Vacated Units.* (1) If an Eligible Family vacates its unit in violation of the provisions of the Lease or tenancy agreement, the Owner shall receive housing assistance payments in the amount of 80 percent of the Contract Rent for a vacancy period not exceeding 60 days or the expiration or other termination of the Lease or tenancy agreement, whichever comes first; *Provided, however,* That if the Owner collects any of the Family's share of the rent for this period in an amount which, when added to the 80 percent payments, results in more than the Contract Rent, such excess shall be payable to HUD or as HUD may direct; *And provided further,* That if the vacancy is the result of action by the Owner, the Owner shall not receive any payment under this paragraph if his action was in violation of the Lease or the Contract or any applicable law or if the Owner failed to comply with § 882.215.

(2) The Owner shall not be entitled to any payment under this paragraph (b) unless he: (i) Immediately upon learning of the vacancy, has notified the PHA of the vacancy or prospective vacancy, (ii) has taken and continues to take all feasible actions to fill the vacancy including, but not limited to, contacting applicants on his waiting list, if any, requesting the PHA and other appropriate sources to refer eligible applicants, and advertising the availability of the unit and (iii) has not rejected any eligible applicant except for good cause acceptable to the PHA.

(3) The Owner shall not be entitled to housing assistance payments with respect to vacant units under this paragraph (b)

to the extent he is entitled to payments from other sources (for example, payments for losses of rental income incurred for holding units vacant for relocatees pursuant to Title I of the HCD Act or payments under § 882.112).

§ 882.106 Initial contract rents.

(a) *Fair Market Rent Limitation.* For any Existing Housing unit, the sum of the Contract Rent and any Allowance for Utilities and Other Services shall not exceed the applicable Fair Market Rent, except that such Fair Market Rent may be exceeded by up to 10 percent if the PHA certifies that such higher rent meets the test of reasonableness in paragraph (b), specifies the factor(s) on which the certification is based, and HUD approves. Upon request by the PHA, the Fair Market Rent may be exceeded by up to 20 percent in a designated area, where the Assistant Secretary for Housing Production and Mortgage Credit determines that special circumstances warrant such higher rents or determines that such higher rents are necessary to the implementation of a Local Housing Assistance Plan, and that such higher rents are reasonable in relation to the prevailing rents in the designated areas for available modest housing taking into account quality, amenities, facilities, and maintenance and management services.

(b) *Reasonableness of Rents.* In any case, the PHA shall determine and so certify that the Contract Rent for the dwelling unit for which it approves a Lease does not exceed a rent that is reasonable in relation to the location, quality, amenities, facilities, and mangement and maintenance services of the unit.

§ 882.107 Term of ACC, lease, and housing assistance payments contract.

(a) *Term of ACC.* The term of the ACC shall be for five years.

(b) *Term of Lease and of Housing Assistance Payments Contract.* The Lease shall be for not less than one year nor

more than three years but may contain a provision permitting termination upon 30 days advance written notice by either party. The term of the Contract shall be for the term of the Lease; *Provided,* That if a Family continues in occupancy after the expiration of the term on the same terms and conditions as the original Lease (or changes thereto which have been approved by the PHA and incorporated in the Contract where appropriate), the Contract shall continue in effect for the duration of such tenancy subject to the limitation in the next sentence. The specified Contract and Lease term, including specified renewal options, if any, and any continuation of tenancy beyond the Lease term shall in no case exceed three years or extend beyond the term of the ACC pertaining to the Contract and the Lease. This limitation shall not preclude the execution of a new Lease and Contract for the dwelling unit.

§ 882.108 Rent adjustments.

(a) Contract Rents shall be adjusted as provided in paragraphs (a)(1) and (2) of this section upon request to the PHA by the Owner, provided that the unit is in Decent, Safe, and Sanitary condition and that the Owner is otherwise in compliance with the terms of the Lease. The Owner's request for an adjustment shall be accompanied by a certification signed by the Owner and the Family that the unit is in Decent, Safe, and Sanitary condition and that the Owner is otherwise in compliance with the terms of the Lease. If the Owner is unable to obtain the Family's signature on the certification, he shall submit a statement explaining why he was unable to obtain such signature, and in such case the PHA will determine whether he is entitled to an adjustment under this section. Subject to the foregoing, adjustments of Contract Rents shall be as follows:

(1) *Annual Adjustments.* An adjustment as of any anniversary date of the Lease not to exceed the percentage of change in the applicable published Fair Market Rent (with appropriate reduction in the adjustment where util-

ities are paid directly by the Family): *Provided,* That the Owner has the legal right to terminate the tenancy as of such anniversary date.

(2) *Special Adjustments.* A special adjustment, subject to HUD approval, effective as of the date when the Owner has the legal right to terminate the tenancy, to reflect increases in the actual and necessary expenses of owning and maintaining the unit which have resulted from substantial general increases in real property taxes, utility rates, or similar costs (i.e., assessments, and utilities not covered by regulated rates), but only if and to the extent that the Owner clearly demonstrates that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by the annual adjustments provided for in paragraph (a)(1) of this section. The Owner shall submit financial statements to the PHA which clearly support the increase.

(b) *Overall Limitation.* Notwithstanding any other provisions of this Part, adjustments as provided in this section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the PHA (and approved by HUD, in the case of adjustments under paragraph (a)(2)) of this section.

§ 882.109 Housing quality standards.

Housing used in this program shall meet the Performance Requirements set forth in this section. In addition, the housing shall meet the Acceptability Criteria set forth in this section except for such variations as are proposed by the PHA and approved by HUD. Local climatic or geological conditions or local codes are examples which may justify such variations.

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§ 882.110 Types of housing.

(a) Any type of Existing Housing may be utilized under this part, including, but not limited to, existing FHA insured, section 202 direct loan, Farmers Home Administration insured or direct loan, or VA guaranteed properties; or properties held by the Secretary; or properties sold by the Secretary on which he has taken back a purchase money mortgage. (But see paragraph (c) of this section.)

(b) Congregate Housing may be utilized for eligible elderly, handicipped, disabled or displaced families and individuals. The Fair Market Rent for Congregate Housing shall be the same as for 0- and 1-bedroom units (as appropriate) of the same structure type, and the Contract Rent shall not include the cost of providing and serving food.

(c) In any section 221(d)(3) below market interest rate (BMIR), section 202, or section 236 project: (1) Units receiving assistance under section 23 or rent supplement programs may continue to receive such assistance, and (2) units not receiving such assistance may receive section 8 assistance only after approval by the Assistant Secretary for Housing Production and Mortgage Credit and the Assistant Secretary for Housing Management on a case by case basis. In granting such approvals, the number of units assisted under section 8 (together with any section 23 and/or rent supplement units) will generally be limited to 20 percent of the units in each such project.

(d) For any section 221(d)(3) BMIR, section 202, or section 236 untt, the housing assistance payment shall be the amount by which the rent payable by the Eligible Family under section 23 or section 8 is less than the subsidized rent (which subsidy shall not be reduced on account of any section 23 or section 8 assistance).

(e) In no event may any occupant receive the benefit of more than one of the following: rent supplement, section 23 housing assistance, or section 8 housing assistance.

§ 882.111 Equal opportunity requirements.

Participation in this program requires compliance with Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, Executive Order 11063 and all rules, regulations, and requirements issued pursuant thereto. The PHA shall comply with section 3 of the Housing and Urban Development Act of 1968 and all applicable rules, regulations, and requirements.

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§ 882.113 Establishment of income limit schedules; 30 percent occupancy by very low-income families.

(a) HUD will establish schedules of Income limits for determining whether families qualify as Lower-Income Families and Very Low-Income Families.

(b) Each PHA shall so administer its Existing Housing program under this part, including the issuance of a sufficient number of Certificates to Very Low-Income Families, so that at least 30 percent of the Families for whom Leases are approved by the PHA are Very Low-Income Families. However, in connection with periodic reexamination of Family Income, the PHA shall ascertain whether at least 30 percent of all the assisted Families are Very Low-Income Families, and where the percentage is lower than 30 percent, the PHA shall thereafter use its best efforts in connection with subsequent issuance of Certificates of Family Participation to achieve at least a 30 percent level.

§ 882.114 Establishment of amount of housing assistance payments.

The amount of Housing Assistance Payment on Behalf of Eligible Family, to be determined in accordance with schedules and criteria established by HUD, will equal the difference between (a) no less than 15 percent nor more than 25 percent

of the Family's Income and (b) the Gross Rent, taking into consideration the Income of the Family, the number of minor children in the household, and the extent of medical or other unusual expenses incurred by the Family, except that, in the case of a large Very Low-Income Family or a very large Lower-Income Family or a Family with exceptional medical or other unusual expenses, the amount of the housing assistance payment shall be the difference between 15 percent of the Family's Income and the Gross Rent. The term large Family means a Family which includes six or more minors (other than the head of the Family or spouse). The term very large Family means a Family which includes eight or more minors (other than the head of the Family or spouse). The amount of the housing assistance payment shall be adjusted, where appropriate, to reflect the Shopping Incentive Credit pursuant to § 882.115.

§ 882.115 Shopping incentive credit to family for savings of government assistance payments.

(a) As an incentive to Families to find the most economical Decent, Safe, and Sanitary housing suitable to their needs and approvable under this Part, if a Family selects a unit (other than a unit receiving the benefit of Federal, State or local subsidy) for which the Owner's proposed Contract Rent plus any applicable Allowance is below the applicable Fair Market Rent, the Family will be given credit (Shopping Incentive Credit) by a reduction in its required monthly Gross Family Contribution.

(b) The amount of the monthly Shopping Incentive Credit shall be the dollar amount equal to that percentage of the Gross Family Contribution which the Rent Savings is of the Fair Market Rent. The Rent Saving is the amount by which the Fair Market Rent (1) exceeds the approved Contract Rent (plus any applicable Allowance), or (2) exceeds the initially proposed Contract Rent (plus any applicable Allowance), if that be higher than the approved Contract Rent (plus any applicable Allowance).

§ 882.116 Responsibilities of the PHA.

In administering its ACC with HUD, the PHA (subject to review or audit by HUD) shall be responsible for the following:

(a) Publication and dissemination of information concerning the availability and nature of housing assistance for Lower-Income Families;

(b) Public invitation of Owners to make dwelling units available for leasing by Eligible Families and development of working relationships and contacts with landlords and appropriate associations and groups;

(c) Receipt and review of applications for Certificates of Family Participation and maintenance of a waiting list in accordance with this part;

(d) Issuance of Certificates of Family Participation to Eligible Families;

(e) Notification of families determined to be ineligible;

(f) Provision to each Certificate holder of basic information on applicable housing quality standards and inspection procedures, search for and selection of housing, landlord and tenant responsibilities, and basic program rules including the operation of the Shopping Incentive Credit;

(g) Determination of amounts of Gross Family Contributions and Shopping Incentive Credits, if any;

(h) Determination of amounts of housing assistance payments;

(i) Review of and action on Requests for Lease Approval;

(j) Making of housing assistance payments;

(k) Reexamination of Family Income, composition, and extent of exceptional medical or other unusual expenses, and redeterminations, as appropriate, of the amount of Gross Family Contribution and amount of housing assistance payment in accordance with HUD-established schedules and criteria;

(l) Redeterminations of amount of rent payable by the Family and amount of housing assistance payment in accordance with HUD-established schedules and criteria as a result of an adjustment by the PHA of any applicable Allowance for Utilities and Other Services;

(m) Inspections prior to leasing and inspections at least annually to determine that the units are maintained in Decent, Safe, and Sanitary condition, and notifications to Owners and Families of PHA determinations;

(n) Authorization of evictions (see § 882.215);

(o) Administration and enforcement of Contracts with Owners and taking of appropriate actions in case of noncompliance or default; and

(p) Complaince by the PHA with equal opportunity requirements.

§ 882.117 Responsibilities of the owner.

(a) The Owner shall be responsible (subject to review or audit by the PHA or HUD) for performing all of his obligations under the Contract and Lease. The Owner's responsibilities shall include but not be limited to:

(1) Performance of all management and renting functions;

(2) Payment for utilities and services (unless paid directly by the Family);

(3) Performance of all ordinary and extraordinary maintenance;

(4) Collection of Family rents;

(5) Preparation and furnishing of information required under the Contract; and

(6) Compliance by the Owner with equal opportunity requirements.

(b) Any Owner may contract with any private or public entity to perform for a fee the services required by paragraph (a) of this section, *provided* that such contract shall not shift any of the Owner's responsibilities or obligations: *And provided further,* That no such contract may be entered into with an entity which is responsible for administration of the Housing Assistance Payments Contract. If the Owner and a PHA wish to enter into a management contract, they may do so: *Provided,* That the Housing Assistance Payments Contract with respect to the housing involved is administered by another PHA or by HUD or an entity acting on behalf of HUD. If no other PHA is able and willing to administer the Contract, HUD will do so or will designate an entity to do so on its behalf, pursuant to § 882.121(b).

§ 882.118 Responsibility of the Family.

A Family receiving housing assistance under this program shall be responsible for fulfilling all its obligations under the Certificate of Family Participation issued to it by the PHA and under the Lease with the Owner.

§ 882.119 Single ACC.

(a) All of the Existing Housing units administered by a PHA under the Housing Assistance Payments Program shall be assigned a single project number and shall be administered under a single ACC Part I.

(b) In the event that a PHA applies for additional Existing Housing units, the units, if approved, shall be incorporated into a revised Part I of the ACC which shall cover the PHA's entire Housing Assistance Payments Program for Existing Housing. The revised Part I shall be for a new term for the aggregate number of units starting with the date of execution of the revised ACC Part I. When the PHA applies for additional units, it shall specify the number of years for which the aggregate

number of units is needed and shall demonstrate such need. On the basis of such showing, HUD shall determine whether the new term for the aggregate number of units shall be five years or such lesser number of years as HUD may find to be justified. The maximum annual contribution of the revised project shall be the sum of (1) the maximum annual contribution for the project prior to the revision plus (2) the amount approved for the additional units which shall be computed on the basis of the current Fair Market Rents.

§ 882.120 Recently completed housing.

(a) Until December 31, 1975, HUD may take the actions authorized by this paragraph (a) for any area in which HUD determines that new construction or substantial rehabilitation is justified (see §§ 880.103 and 881.103 respectively) but that there are one or more projects of newly constructed or substantially rehabilitated housing completed subsequent to December 31, 1972 ("Recently Completed Housing"), with substantial vacancies of extended duration. For any such area, HUD may, for a specified maximum number of units:

(1) Establish Fair Market Rents for such Recently Completely Housing at 75 percent of the Fair Market Rents for new construction then in effect; and

(2) Invite applications to be submitted to HUD by December 31, 1975, by the appropriate PHA or PHAs for an Existing Housing Program for Recently Completed Housing, which may but need not be included as a part of an Application for other housing assistance under this part.

(b) The approval of such an application shall authorize the PHA to (1) publicize the availability of such Fair Market Rents for the specified number of units of Recently Completed Housing, (2) invite Owners of such projects to submit evidence that their units qualitfy as Recently Completed Housing, and (3) inform holders of Certificates of Family Participation of the

locations of such Housing and of the applicable Fair Market Rents.

(c) All provisions of this part, not specifically modified by this section, shall be applicable to Housing under this section.

§ 882.121 Direct HUD administration of programs under this part.

(a) If, after sending the invitations required by § 882.203, no application is received by HUD, by the deadline date, for operation of an Existing Housing Program in the area, or if the only applications received are not approvable, the HUD field office shall make such further inquiry, including advice and offer of assistance, as in its judgment may result in the submission of an approvable application by a PHA.

(b) If, on the basis of such further inquiry and all other pertinent information available to the HUD field office, HUD determines that there is no PHA organized or that there is no PHA able and willing to implement the provisions of this part for an area, HUD (or an entity acting on behalf of HUD) may, pursuant to section 8(b)(1) of the Act, enter into Contracts with Owners and perform the functions otherwise assigned to PHAs under this Part with respect to such area.

(c)(1) If one or more Owners wish to contract for the management of their housing by the PHA which is administering the ACC for that area under this part, and the PHA is willing to do this, or if the PHA owns housing which is suitable for utilization under this part, HUD shall ascertain whether there is another PHA able and willing to enter into an ACC and administer the program under this part with respect to housing which is managed or owned by the first PHA. If so, such an ACC may be entered into, and the housing covered thereby shall be excluded from the ACC with the first PHA.

(2) If on the basis of inquiry and all other pertinent information available to the HUD field office, HUD determines

there is no PHA able and willing to administer an ACC with respect to housing managed or owned by the first PHA, HUD (or another entity acting on behalf of HUD) may, pursuant to section 8(b)(1) of the Act, enter into Contracts with the Owners and perform the functions otherwise assigned to PHAs under this part with respect to such housing.